87-1922

Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NL INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Federal Circuit erred in holding that a regulatory action taken by the federal government to protect public health and welfare cannot, as a matter of law, constitute the taking of property for which the Fifth Amendment requires just compensation.

2. Whether the Court of Appeals for the Federal Circuit erred in failing to recognize that the federal government has a greater obligation to compensate a property owner when the property taken by government action was created in response to government inducements.

3. Whether the Court of Appeals for the Federal Circuit erred in holding that the loss of use of petitioner's single-purpose property was merely a consequential loss resulting from governmental action banning the industry for which the property was created and, therefore, not a compensable taking.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of *certiorari* are set forth in the caption of this case. Pursuant to Rule 28.1, petitioner submits that NL Industries, Inc. has the following parents, subsidiaries (except wholly-owned subsidiaries), and affiliates:

Valhi Inc.

Valhi Subgroup, Inc.

Tre-Tech, Inc.

Pacific Petroleum Products, Inc.

R-N Corporation

Titanium Metals Corporation of America

Enenco, Inc.

Baroid Australia Pty, Limited

Jasra Cebar Baroid

NL Petroleum Services of Canada, Ltd.

Triveni NL

P.T. Baroid Indonesia

Baroid Malaysia Sendirian Berhad

Cebo—Offshore Services Sdn. Bhd.

Cebo—Ballast B.V.

Cebo—Marine B.V.

Cebo—Holland B.V.

Cebo, N.V.

Baroid Drilling Chemical Products Ltd.

Baroid of Nigeria Limited

Baroid (Saudi Arabia) Limited

Sperry-Sun Arabia Ltd.

Cebo U.K. Ltd.

Thai Endeavor Limited
Budin Barit Kimya Sanayi A.S.
Baroid Trinidad Services Limited
Abu Dhabi Drilling Chemicals & Products, Ltd.
Cebo Far East Pte. Ltd.
Baroid de Venezuela, S.A.
Abbey Chemicals Limited
Societe Industrielle Du Titane, S.A.
K/S Ilmenittsmelteverket A/S
Bentone Chemie GmbH

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NL Industries, Inc. (NLI) petitions for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Federal Circuit that affirmed the United States Claims Court's dismissal of NLI's Fifth Amendment claim for just compensation for property taken by governmental action.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit appears at 839 F.2d 1578 (Fed. Cir. 1988), and is reproduced in the Appendix to this Petition at 1a. The opinion of the Claims Court is published at 12 Cl. Ct. 391 (1987), and also is reproduced in the Appendix at 16a. The opinions of the Court of Appeals for the Federal Circuit and the Claims Court in *Allied-General Nuclear Services v. United States*, a companion case which both courts incorporated into their opinions in this

case by reference, are reported at 839 F.2d 1572 (Fed. Cir. 1988) and 12 Cl. Ct. 372 (1987), respectively. These opinions also are reproduced in the Appendix at 3a and 46a. Allied-General Nuclear Services also is petitioning for a writ of *certiorari*.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on February 24, 1988. NLI seeks a writ of *certiorari* pursuant to the provisions of 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution, amendment V:

> [N]or shall private property be taken for public use, without just compensation.[1]

STATEMENT OF THE CASE

NLI alleges that President Carter's 1977 ban on commercial reprocessing of spent nuclear fuel took the company's property without just compensation in violation of the Fifth Amendment. The property that was taken is: (1) physical property, including certain rail and truck transportation systems intended for transporting spent nuclear fuel to and from reprocessing plants and NLI's Wilmington, Delaware plant where the systems were fabricated; (2) rights under a contract pursuant to which NLI had agreed to provide transportation services for one specific reprocessing facility; (3) NLI's rights under an implied-in-fact contract with the United States Government; and (4) NLI's investment-backed expectations that the market for transporting spent nuclear fuel for the reprocessing industry would exist at least through the end of the 20th century.

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[1] The full text of amendment V is reproduced in the Appendix at 88a.

NLI's property interests were created in response to federal government inducements that were designed by the government to stimulate private sector investment in industries supporting the nuclear power industry.[2] After the passage of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011-2296 (1982 & Supp. III 1985), the United States Government adopted and sponsored programs (including the Atoms for Peace Program) to motivate private industry to invest in nuclear power production. Recognizing that domestic nuclear power production could not proceed absent a means of disposing of spent nuclear fuel, the Commission also embarked upon an active campaign to induce private companies to reprocess spent nuclear fuel.[3] This campaign included, among other things, express invitations to companies that were qualified to enter the industry, technical assistance, and projections of the profitability of the industry

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[2] One such government-induced industry was reprocessing of spent nuclear fuel. In a nuclear reactor, the uranium isotope 235 splits in a process called fission which produces heat and fission products. During this process, plutonium is created, some of which also fissions. Continuing fission in a controlled chain reaction within a reactor heats water to produce steam to generate electricity. After nuclear fuel assemblies have been in a reactor for a period of time they are no longer able to sustain a chain reaction sufficient to produce electricity. The fuel assemblies are then discharged as "spent" although they still contain usable uranium and plutonium which can be chemically extracted. The process by which the usable uranium and plutonium is chemically extracted and separated is called reprocessing and is commonly referred to as the "back-end" of the fuel cycle. After reprocessing, the usable materials are recycled to the front end of the process, the nuclear reactors.

[3] In January 1975, the Atomic Energy Commission (AEC) was abolished and the Nuclear Regulatory Commission (NRC) was created to assume the AEC's licensing and related regulatory functions. 42 U.S.C. §§ 5814(a), 5841(f) (1982). The AEC's other functions—development, promotional, and military—were transferred to the Energy Research and Development Administration (ERDA), 42 U.S.C. §§ 5814(c), 5811 (1982), and subsequently to the Department of Energy. Hereinafter, "Commission" refers to either the AEC or the NRC, as appropriate.

through the year 2000. Indeed, both the Claims Court and the Federal Circuit found that the federal government had induced the creation of the commercial reprocessing industry. *See* Appendix at 2a, 5a, 13a-14a, 17a, 18a-19a, 22a, 48a, 72a-73a.

NLI entered the reprocessing industry in response to government inducements and to representations that the government needed NLI's expertise because very few companies were qualified to provide the essential service of transporting spent fuel to and from the reprocessing facilities. Nuclear materials must be transported in containers shielded with lead or depleted uranium products to prevent the escape of radiation. Very few companies had the capability, as NLI did, to design and manufacture such containers.

In 1971, NLI contracted with Allied General Nuclear Services (AGNS) to provide a transportation system for the Barnwell Nuclear Fuel Reprocessing Facility (BNFP). AGNS (comprised of Allied Chemical Nuclear Products, a subsidiary of Allied Chemical, and Valley Pines Associates) had been formed to construct, own, and operate BNFP.[4] The system that AGNS ordered from NLI was to include rail and truck systems, depot loading, and fixed facility structures and designs.

The government ratified the contract between NLI and AGNS and was intimately involved in the development of

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[4] AGNS had obtained a construction license for BNFP and fully expected to obtain an operating license. The Atomic Energy Act and regulations promulgated pursuant thereto provide a flexible two-step procedure for licensing private nuclear production facilities. The regulatory scheme provides that a construction permit holder who complies with the applicable regulations will receive an operating license unless, after a hearing, the Commission determines that issuance of a license would be inimical to the common defense and security or to the health and safety of the public. *See* 42 U.S.C. § 2133(d) (1982); 10 C.F.R. §§ 50.23, 50.50, 50.56, 57.57 (1988) and 70.31 (1987).

NLI's transportation system. The Commission, through its licensing proceedings, reviewed and approved each successive refinement of NLI's design. During this process, government representatives repeatedly impressed upon NLI the need for the containers, urging that NLI was one of very few companies with the capacity or capability to produce a licensable transportation system. In 1976, the Commission licensed NLI's transportation systems, which were uniquely designed and built to transport spent and reprocessed fuel to and from reprocessing facilities.

On April 7, 1977, without prior notice to NLI or any public warning, President Carter imposed a complete ban on domestic commercial reprocessing. He instituted the ban as part of his nuclear non-proliferation objectives. The Carter administration sought to support its efforts to deter other countries from creating plutonium through reprocessing spent nuclear fuel by sacrificing the reprocessing industry in the United States. President Carter's action was an abrupt and unforeseeable reversal of the policy of previous administrations which, since the late 1950's, had induced investment into the domestic reprocessing industry notwithstanding the theoretical risk of nuclear proliferation.

On December 23, 1977, the Commission acceded to the President's announced ban by suspending its decision-making process regarding proposals for the recycling of spent nuclear fuel and the use in nuclear reactors of plutonium recovered from that fuel.[5] 42 Fed. Reg. 65,334 (1977); *see also* NRC Memorandum of Decision, 43 Fed. Reg. 20,575 (1978). The Commission's suspension, how-

[5] The Commission had been drafting an environmental impact statement in order to comply with the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1982). This statement was begun in 1974 and was named the Generic Environmental Statement On The Use Of Recycled Plutonium In Mixed Oxide Fuel In Light Water Cold Reactors (GESMO). At the time the Commission was proceed-

ever, was not based on any provision of the AEA. The Commission refused to make any determinations relating to inimicality. Its published statement expressly stated: "We do not find at this time that issuance of any of the licenses would be inimical to the common defense and security." [6] *Id.* at 20,577 n.4.

The Commission never made a determination of inimicality and never denied licenses on any other grounds. In 1980, after the International Atomic Energy Agency completed a study which concluded that the reprocessing industry did not pose a threat to the public and encouraged reprocessing, the Commission wrote to President Carter and requested reconsideration of his policy on private reprocessing. 45 Fed. Reg. 53,933 (1980). The President's domestic policy adviser responded by stating that the President's position had not changed. Thereafter, the Commission called for public comment on whether to reconvene GESMO, *id.*, but the licensing proceedings were never reopened, nor were they formally terminated either on grounds of inimicality or as otherwise provided in the statute. In effect, the Commission merely continued its open-ended moratorium on licensing.

President Regan lifted the ban on commercial reprocessing on October 8, 1981, but by then the substantial investment of both NLI and AGNS had been rendered entirely worthless. The subsequently enacted Nuclear

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ing with GESMO, it also was conducting adjudicatory licensing proceedings on applications by private companies for licenses for construction and operation of nuclear fuel reprocessing plants. While this process was taking place, President Carter announced the ban on private reprocessing.

[6] Section 103 of the AEA provides that "no license may be issued . . . if, in the opinion of the Commision, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. § 2133(d) (1982). This section is reproduced in full in the Appendix at 88a.

Waste Policy Act, 42 U.S.C. §§ 10101-10226 (1982), contemplated burial of spent nuclear fuel rather than reprocessing. Thus, the regulatory environment had changed so significantly that reprocessing was no longer viable and NLI's property had been rendered worthless. In fact, both of the courts below expressly found that NLI's and AGNS's property had been rendered worthless. *See* Appendix at 2a, 4a, 5a, 7a-8a, 22a.

As a result of the government action, both NLI and AGNS brought actions in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1982), claiming that the Fifth Amendment required the United States to pay just compensation for the companies' property taken by government action. On May 22, 1987, the Claims Court granted the government's motion to dismiss NLI's complaint for failure to state a claim. *NL Industries, Inc. v. United States*, 12 Cl. Ct. 391 (1987) (Appendix at 16a). The court held that there could be no taking as a matter of law because NLI's "property was acquired, generated, and developed, well-within a preexisting regulatory scheme which subjected property to the possibility of the imposition of the limitations now complained of; and (2) government encouragement of plaintiff's acquisition of this property does not give rise to or provide support for a taking claim." *Id.* at 33a.

The Claims Court also dismissed AGNS's claim holding alternatively that: (1) a taking claim was premature because AGNS had not yet challenged the Commission's failure to issue the license; or (2) if the court had jurisdiction, AGNS's claim was barred because the property allegedly taken was generated under an existing regulatory system. 12 Cl. Ct. 372 (1987) (Appendix at 46a).

Both NLI and AGNS appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit held that AGNS's claim was not premature because at least a temporary taking could have occurred between April 7,

1977, when President Carter instituted the ban, and October 8, 1981, when President Reagan lifted the ban. *Allied-Gen. Nuclear Servs. v. United States*, 839 F.2d 1572, 1575 (Fed. Cir. 1988) (Appendix at 3a, 8a-10a) (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987)).

The court further held that a regulatory action intended to protect common defense and security or health and welfare "cannot be a taking" (Appendix at 11a) because "no one has a legally protected right to use property in a manner that is injurious to the safety of the general public." *Id.* at 10a (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)). The court stated that the recent decision of this Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232 (1987), "dusted off *Mugler* and put it back on its pedestal, while reducing *Pennsylvania Coal Co. v. Mahon* [260 U.S. 393 (1922)] as a precedent pretty much to its own peculiar facts." Appendix at 11a.

The Federal Circuit expressly found that the government action had destroyed the entire value of petitioner's property, *id.* at 2a, 10a-12a, and that the property destroyed had been created in response to government inducements. *Id.* at 2a, 13a-14a. Nonetheless, the court held that NLI and AGNS were not entitled to just compensation, *as a matter of law*, because the government action was intended to protect common defense and security and public health and welfare. The court also held that the substantial inducements pursuant to which AGNS and NLI created their property had no effect on the taking claim. *Id.* at 13a-15a.

In *NLI*, the Federal Circuit held that NLI's "claim is subject to the same infirmities as [AGNS' claim], plus the added one that the act constituting the alleged taking had as its target [AGNS], not NL Industries . . . ." The court concluded that frustration of business by loss of a

customer is not a taking. *NL Industries, Inc. v. United States*, 839 F.2d 1578, 1579 (1988) (Appendix at 1a, 2a) (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923)).

REASONS FOR ALLOWANCE OF THE WRIT

Absent review by this Court, the Federal Circuit is the ultimate authority on Fifth Amendment claims for just compensation against the United States. Monetary claims against the United States, including those for just compensation under the Fifth Amendment, may be brought only in the Claims Court under the Tucker Act, 28 U.S.C. § 1491.[7] Appeal from the Claims Court is to the Federal Circuit. None of the regulatory taking cases decided by this Court since 1980 have involved inverse condemnation claims against the United States under the Tucker Act.[8] They have involved various alleged takings by state and local governments or claims that a federal statute must be invalidated because it effects an uncompensated taking.

The Federal Circuit affirmed the summary dismissal of NLI's complaint despite its findings that federal government action had destroyed the entire value of petitioner's property and that petitioner's property had been created in response to federal government inducements. *See* Appendix at 2a. The Federal Circuit's decision substantially departs from this Court's stated taking analysis, as articulated in recent decisions. This unjustified departure threatens to create a unique rule in federal

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[7] Monetary claims against the United States for less than $10,000 may be brought in the United States District Court. 28 U.S.C. § 1346 (1982).

[8] In 1980, this Court decided *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), on *certiorari* to the Court of Claims. That case, however, involved a claim for compensation under the Indian Claims Commission Act, not the Tucker Act.

taking cases, which may preclude citizens with meritorious claims from recovering just compensation against the federal government.

This petition should be granted because the decision of the United States Court of Appeals for the Federal Circuit directly conflicts with a line of decisions rendered by this Court, beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and ending with *Keystone Bituminous Coal Ass'n v. DeBeneditis*, 107 S. Ct. 1232 (1987). The court below ignored this line of regulatory taking cases and summarily disposed of NLI's claim based upon a single determination: the regulation at issue was for the purpose of protecting common defense and security and public health and welfare. The Federal Circuit created a *per se* rule that a legitimate government action to protect health and welfare cannot, as a matter of law, constitute a compensable taking. The court's rule is irreconcilably at odds with more than sixty years of this Court's precedents affirming the right to recover just compensation for a regulatory taking.

Further, the Federal Circuit failed to consider the compelling federal inducements pursuant to which NLI created the property interests at issue in this case. The court's holding that these inducements had no effect on NLI's claim for compensation is directly contrary to this Court's decisions in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In both of those cases this Court recognized that the government has a greater obligation to compensate a property owner when the property was created in response to government inducements.

Finally, in deciding NLI's appeal, the Federal Circuit improperly applied *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) to bar petitioner's recovery of just compensation on grounds that NLI's property interests were only indirectly affected. *Omnia* bars recov-

ery only where the government action destroys merely a business opportunity; not where the action destroys the value of the underlying property itself. In this case, the government induced the creation of an entire industry. Private companies, including NLI, entered that industry by creating property and contracting for the use of that property. Suddenly, by regulatory action, the government outlawed the industry. The government thereby destroyed not only the contracts, but also the underlying property interests, since the ban extended to the entire industry for which the property was created. NLI lost a concrete investment, not a mere business opportunity which could be pursued elsewhere.

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

In the recent past this Court has refined and expanded the law of regulatory takings.[9] The Federal Circuit, ignoring this Court's pronouncements, affirmed the summary dismissal of NLI's taking claim in a manner that directly conflicts with both the recent decisions of this Court, and this Court's admonition that resolution of taking claims requires "essentially ad hoc, factual inquiries" into "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action . . . ." *Kaiser Aetna*, 444 U.S. at 175; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

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[9] The Executive Branch has recognized this evolution and has expressly incorporated this Court's interpretation of the law governing governmental actions that interfere with constitutionally protected property rights into a directive to Executive Branch officers. *See* Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988).

A. The Federal Circuit's *Per Se* Approach to Regulatory Taking Claims Violates Well-Settled Principles Articulated by this Court

The Federal Circuit's opinions in *NLI* and *AGNS* limited the test for determining when a party must be compensated for property that is destroyed by government action to a simple *per se* rule: If the challenged regulation advances legitimate government interests, compensation is not required. This approach is flatly inconsistent with a long line of regulatory taking cases in this Court, including the recent decision in *Keystone*. The Federal Circuit's decision creates a separate rule for federal takings, a rule which would allow the federal government to deny compensation in circumstances under which this Court has held that state and local governments must provide compensation.

Regulatory taking claims were first explicitly recognized in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where this Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. Subsequently, this Court recognized that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n.8 (1979) (quoting *Chicago, Rock Island & P. Ry. v. United States*, 284 U.S. 80, 96 (1931)); *accord Penn Cent. Transp. Co.*, 438 U.S. at 124.

Today the doctrine of regulatory takings is clear and well established. Indeed, this Court recently succinctly stated the two-part test that has developed for determining whether a regulatory taking has occurred: "[A] regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or denies an owner economically viable use of his land.*'" *Keystone*, 107 S. Ct. at 1242 (quoting *Agins v. Tiburon*, 447 U.S. 255 (1980) (emphasis added) (omission in original)); *see*

also Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3145-47 (1987); *Penn Cent. Transp. Co.*, 438 U.S. at 127.

The Federal Circuit disregarded this Court's rulings by finding that the regulatory action had completely destroyed NLI's property, but nonetheless holding that a taking had not occurred because the regulation was for a legitimate government purpose. Simply stated, the Federal Circuit decided that if the first part of the test ("substantially advance legitimate state interests") is satisfied, the second part ("denies an owner economically viable use") is irrelevant. The Federal Circuit's decision improperly rewrites the Fifth Amendment as interpreted by this Court.

The Federal Circuit's reliance on this Court's citation of *Mugler* in *Keystone* is misplaced. In *Mugler*, this Court held that the state, by exercise of its police powers, may destroy property that constitutes a nuisance without providing just compensation. The Federal Circuit interpreted *Keystone* not only as reviving *Mugler*, but also as removing the need to provide compensation in any case where the welfare of the general public is the basis for the destruction of the property. The Federal Circuit has thus created its own rule, inconsistent with the Fifth Amendment, that compensation must be paid only if the government action bestows upon the public "a nonessential benefit." Appendix at 12a.

By relying on *Mugler*, the Federal Circuit infers that an action to protect health and welfare is equivalent to an action to abate a nuisance, an action which may not require compensation under the Fifth Amendment.[10] *Keystone*, 107 S. Ct. at 1245. *Keystone* neither holds nor

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[10] The dissent in *Keystone*, however, noted that even the nuisance exception does not allow "complete extinction of the value of a parcel of property." *Keystone* 107 S. Ct. at 1257 (Rehnquist, C.J., dissenting).

implies that a regulatory action based on health or welfare cannot constitute a taking. Quite the contrary, the Court expressly recognized: " 'The nuisance exception to the taking guarantee is not coterminous with the police power itself.' " *Keystone*, 107 S. Ct. 1245 n.20 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 145 (Rehnquist, C.J., dissenting); *Keystone*, 107 S. Ct. 1256 (Rehnquist, C.J., dissenting) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 145 (Rehnquist, C.J., dissenting)).

In any event, the facts of this case would not support a finding that the government exercised its authority to abate a nuisance. The nuisance exception to the taking clause allows the government to prevent a misuse or illegal use of property. *See, e.g., Curtin v. Benson*, 222 U.S. 78 (1911). Use of NLI's property was not illegal because NLI had received licenses before the President determined that, for foreign policy reasons, the domestic reprocessing industry should be sacrificed to prevent the proliferation of nuclear weaponry. Moreover, the Commission never denied a license for any reason, including a determination that reprocessing of spent nuclear fuel was "inimical to the common defense and security or to the health and safety of the public." Appendix at 89a.[11]

B. The Federal Circuit Failed to Follow this Court's Decisions Establishing That Government Inducements May Create an Investment-Backed Expectation

The Federal Circuit's holding that NLI's taking claim was not affected by the significant inducements in response to which petitioner created its property interests

[11] Petitioner has alleged that the taking occurred as soon as President Carter announced the ban. The Commission did not have independent power to disregard the President's order. It is simply the arm of the executive charged with implementing licensing under the AEA and President Carter, exercising his executive and foreign policy powers, preempted the Commission from exercising its legislatively mandated licensing function. *See, e.g., Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926).

also is contrary to prior decisions of this Court. In finding a taking had occurred in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), this Court relied heavily on the fact that the property at issue was "constructed at the instance and implied invitation of Congress." *Id.* at 334. Because the company had created the property in response to that invitation, "it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company." *Id.* at 335.

This Court also recognized a variation on *Monongahela Navigation* in *Kaiser Aetna*, 444 U.S. at 179. In *Kaiser Aetna*, the United States had consented to petitioners' improvements to a private, non-navigable pond. After the improvements transformed the property into a navigable body of water subject to government regulation, the government required petitioners, without compensation, to allow free access to the property. While stating that the consent of individual officials representing the United States cannot estop the United States, this Court recognized that government representations or approvals may lead to "the fruition of a number of expectations embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Id.*

In this case, NLI alleged that it created its property in response to government inducements and specifically to assume an obligation, i.e., operation of the "back-end" of the fuel cycle, previously undertaken by the government. The Federal Circuit recognized these substantial inducements, but held that they had no bearing on NLI's taking claim. The lower court's decision, therefore, directly contradicts this Court's decisions holding that the government has a greater obligation to compensate a

property owner when the property destroyed by government action was generated in response to government inducements.

II. PETITIONER'S CLAIM IS NOT BARRED BY *OMNIA*

The Federal Circuit incorrectly held that *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), is by itself, "authority enough to support [the Claims Court's] holding that frustration of a business by loss of a customer was not a taking." Appendix at 2a. NLI did not allege frustration of business or loss of a customer. It alleged four types of property interests, including a contract with AGNS, that were created in response to government inducements, approved by the government, and then destroyed by direct government action.

Omnia does not prevent NLI's recovery of just compensation for either the physical property or the contract. *Omnia* recognized only that the law affords no remedy for consequential loss resulting from governmental action; in that case, the loss of profits because the government requisitioned the steel that the petitioner had an option to purchase. The petitioners in *Omnia* had invested no capital in the property they alleged had been taken; they had lost merely an opportunity to earn a profit from the sale of steel that they had been prevented from purchasing by government action. The petitioner had no "investment-backed expectation" and no physical property. In contrast, NLI, at the request of the government, generated property that was an essential part of the reprocessing industry. Both the physical property and the contract to use that property lost all value when the government banned commercial reprocessing.

NLI's case is governed by *Monongahela Navigation*, a case distinguished in *Omnia Commercial Co.*, 261 U.S. at 513-14. In *Monongahela Navigation*, just as in this

case, the government induced and supported creation of the petitioner's property and consented to a franchise for petitioner to earn a return on its investment in the property. This Court recognized the petitioner's entitlement to compensation for the value of the physical property and the value of the franchise.

NLI similarly created its property in response to government inducements and with government consent. The contract with AGNS was an integral part of NLI's physical property. It was a measure of "the productiveness of the property." *Monongahela Navigation Co.*, 148 U.S. at 329. Accordingly, NLI is entitled to compensation for both the physical property and the contract with AGNS. *Id.* Indeed, it is well established that a contract is property within the Fifth Amendment, *Lynch v. United States*, 292 U.S. 571 (1934), and that the government may appropriate a contract with the resulting obligation to pay just compensation. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924); *see also Armstrong v. United States*, 364 U.S. 40 (1960) (government's appropriation of materials intended for use in the construction of boats destroyed the value of plaintiff's liens on the materials and, therefore, constituted a taking of the liens by the government.)

III. CONCLUSION

Over the years this Court has recognized that the Fifth Amendment's just compensation provision was

> designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Pennell v. City of San Jose, 108 S. Ct. 849, 856 (1988); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987); *Armstrong*, 364 U.S. at 49. Contrary to this principle, the

Federal Circuit has fashioned a rule for federal taking cases that would allow the federal government to avoid just compensation for takings caused by federal regulatory action, merely by characterizing the action as one to protect health and welfare. Accordingly, this petition for writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 87-1474

NL INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

Feb. 24, 1988

Herbert L. Fenster, of McKenna, Conner & Cuneo, Washington, D.C., argued, for plaintiff-appellant. With him on the brief, were David A. Churchill and Tami Lyn Azorsky.

Terrence S. Hartman, Commercial Litigation Branch, Dept. of Justice, Washington, D.C., argued, for defendant-appellee. With him on the brief were Richard K. Willard, Asst. Atty. Gen. and David M. Cohen, Director. Also on the brief, were Avrum Fingeret, Dept. of Energy and Charles Mullins, Nuclear Regulatory Com'n, of counsel.

Before RICH and SMITH Circuit Judges, and NICHOLS, Senior Circuit Judge.

NICHOLS, Senior Circuit Judge.

This is a companion case to *Allied-General Nuclear Services, et al. v. United States*, No. 87-1481, brought also in the Claims Court and decided on cross-motions for summary judgment by the same judge at the same time. Whereas Allied-General was to serve the purpose of the government by reprocessing the spent fuel remaining after its power-producing capability had been exhaused in nuclear power plants, NL Industries was to transport the spent fuel to the Barnwell plant for reprocessing, a difficult and dangerous job. To do it, NL Industries built an elaborate and costly fleet of transportation equipment, which has become useless owing to President Carter's decision not to allow the Barnwell plant to operate. Appellant admits its claim is subject to the same infirmities as that of Allied-General, plus the added one that the act constituting the alleged taking had as its target Allied-General, not NL Industries, so NL Industries is separated from it by an additional step. The trial court, 12 Cl.Ct. 391, rightly, we think, thought that *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923), was, by itself, authority enough to support its holding that frustration of a business by loss of a customer was not a taking.

The trial court severed counts II and IV of the amended complaint under its Rule 54(b) and its judgment does not relate to them. This action economizes judicial resources by allowing consideration of the "taking" counts I and III, together with Allied-General's appeal. The severed counts allege breach of contract implied in fact. The trial court, following our remand, will consider them and take appropriate action.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 87-1481

ALLIED-GENERAL NUCLEAR SERVICES, ALLIED CHEMICAL NUCLEAR PRODUCTS, INC. and VALLEY PINES ASSOCIATES,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Feb. 24, 1988

Brian D. Forrow, Morristown, N.J., argued for plaintiffs-appellants. With him on the brief was Gerald P. Rooney. Also on the brief were H. Roderic Heard and Susan L. Walker, Wildman, Harrold, Allen & Dixon, Chicago, Ill., David L. Ream, Houston, Tex., Bennett Boskey and Edwin E. Huddleson, III, of Volpe, Boskey & Lyons, Washington, D.C., Philip B. Kurland and Alan S. Madans, Rothschild, Barry & Myers, Chicago, Ill.

Terrence S. Hartman, Commercial Litigation Branch, Dept. of Justice, Washington, D.C., argued for defendant-appellee. With him on the brief were Richard K. Willard, Asst. Atty. Gen. and David M. Cohen, Director. Also on the brief was Avrum Fingeret, Dept. of Energy, of counsel.

Before RICH, Circuit Judge, Nichols, Senior Circuit Judge, and SMITH, Circuit Judge.

NICHOLS, Senior Circuit Judge.

Beside a stream in South Carolina stands one of the most remarkable white elephants in our American history, rich as it is in similar constructions. It is a plant which is completely useless but has absorbed, according to its owners, over $200,000,000 in their capital plus unstated amounts in public funds. The owners seek to shift their loss to the United States, making use of the consent granted in the Tucker Act, 28 U.S.C. § 1491, to sue the government for just compensation in instances of takings of property "for public use." The Claims Court dismissed the suit, without prejudice, for want of "jurisdiction" because it was premature but held, in the alternative, if the court had jurisdiction, the suit must be dismissed "with prejudice" because the property allegedly taken "was generated under the existing regulatory system." We hold that if premature at all, the suit was so as to only part of the claim, and the prematurity was not jurisdictional. Therefore, we turn to the alternative decision and hold the court had jurisdiction to make it and that the claimant had no legally protected property right to operate the plant, which could have been the subject of a fifth amendment taking, as against the fear it would injure the national security. Therefore, we affirm the dismissal with prejudice.

Background

The Claims Court decision, 12 Cl. Ct. 372 (1987), embodied a full statement of the factual background, expanded in a factual appendix into great detail, service by the judge beyond the call of duty in a case such as this was, of cross-motions for summary judgment. It is not necessary for us to duplicate all this material, and we will confine our summary to the minimum necessary for understanding our legal holding.

Before the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2011-2282, the United States Government, which had discovered how to achieve nuclear fission, and exploited it in the world's first atom bomb, pretty much kept to itself even the development of peaceful uses. The AEA had, however, as one of its objects, the enlistment of private capital, which was supposedly better able to control its costs, in the development of electric power from nuclear fission. A number of private companies came into being which were to feed electricity into the ordinary power grid, but with such fission as the source, instead of combustion, or the fall of water. One of the problems the newborn companies faced was the disposal of their "spent fuel." The government agreed to take care of that. The best way to do it appeared to be a recycling process. The fuel, enriched uranium dioxide, became "spent" in the course of its use, *i.e.*, no longer able to produce power, but radioactive and dangerous still. It had, in part, been transmuted into plutonium. Disposal was difficult. The government therefore promised the power producers to recycle the spent fuel. This involved separating the plutonium from other components, and it could be used for military purposes or to make more fuel. The plant involved in this case is solely to perform this recycling operation and, except for minor structures which have been dismantled and carried away, it is nearly useless for anything else.

Under the AEA it could be constructed and operated only under separate licenses which the Nuclear Regulatory Commission (NRC) could grant or withhold, taking into account, among other things, whether issuance "would be inimical to the common defense and security or the health and safety of the public." 42 U.S.C. §§ 2133(d), 2134(d). The parties agree that the NRC "induced" private industry to undertake the awesome reprocessing task, the motive of the NRC being, of course, its commitment to the power producers to dispose of their

spent fuel. It believed that this operation, too, could be best performed by private industry with private capital. Besides jawboning, the "inducement" took the form of free land as well as technical assistance.

The appellants, being awarded a construction license in 1970, commenced construction in 1971 on the donated land at Barnwell, South Carolina, after which the plant is named. In 1974 the government commenced to process the operating license and besides, to prepare an environmental impact statement, here called GESMO. This is necessary for every government-sponsored project such as this (42 U.S.C. § 4321 and ff), and has never been completed.

While the record is replete with government "inducement," we note an entire absence of any evidence that the government in any manner, express or implied, contracted to share whatever risks there might be in the venture, to warrant that it would succeed, or otherwise shield it against vicissitudes.

Apparently, in connection with the GESMO study, concern began to be expressed as to the impact this plant might have on the problem of "nuclear proliferation." While every application of nuclear fission is fearsome to many, the possibility that nations, whose slogan is "death to the United States," having irresponsible, unprincipled, and bloody-handed dictators, might get nuclear weapons, is pretty near the top of anyone's list of dreads. The bearing of this on the Barnwell plant was evidently not seen when its construction was licensed. Since the recycling produces plutonium, anyone who had a peaceful plant powered by nuclear fission might, if he also had a recycling plant, obtain a nuclear weapon. Thus, checking the use of the recycling process in foreign countries was vital to the control of "nuclear proliferation," and how could the United States assume the lead in such an effort if it ran a recycling plant itself?

On April 7, 1977, President Jimmy Carter announced that because of the above concerns "we," the United States of America, will "defer indefinitely the commercial reproducing and recycling of the plutonium produced in the United States nuclear power programs." Accordingly, a freeze took effect in the processing of the operating license for the Barnwell plant, and in the GESMO. The wisdom and propriety of this action is of course not before us. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed.Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987).

The parties have stipulated that the United States used Barnwell's operating license as a "bargaining chip." This we do not understand to mean that the operating license was actually bargained away to purchase some agreed concession from some foreign country. *Cf. Gray v. United States*, 21 Ct. Cl. 340 (1886). The case has not been argued on that basis. For the taker to take A's property right and grant it to B in return for consideration B has provided to the taker, is a fifth amendment case we do not have here, as our predecessor had in the *Gray* case. Rather, it was that the pursuit of reprocessing by the United States would undermine the credibility of its efforts to discourage production of plutonium abroad. The "bargaining chip" terminology is confusing and something more specific would have been more helpful to the court.

On October 8, 1981, President Reagan announced he was "lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States." However, there has been no action by the NRC or the Department of Energy to revive consideration of the operating license or the GESMO. The government used the plant for R & D from 1977 to 1983, but without profit to Allied-General. Counsel stated that some salvageable portions of the plant have been removed and carried off, but most of it stands there, empty and

forlorn. Allied-General has not made any use of what the trial court calls "statutory procedures" to reactivate the license, and that court thinks that if no more, Allied-General should insist on and obtain a final executive decision on its license application. The court cites Supreme Court authority that a taking claim for a regulatory action is premature until one knows "the nature and extent of permitted development."

Among various lawsuits in which Allied-General has been embroiled, respecting Barnwell, one is particularly important. The others can be left to the trial court's summary. Allied-General was a party to the case reported as *Westinghouse Electric Corp. v. United States*, 598 F.2d 759 (3d Cir.1979). In that case, the freeze, called a moratorium, was reviewed as to its propriety under the law. It had then been of about two years' duration. The court held it well within the purpose of the AEA to consider holding up the license because of the goal of securing international nonproliferation. It opined, if the application was held so long it appeared to be *de facto* denied, and if appropriate findings were not made, judicial recourse would be available. This was not a suit for just compensation, and was not considered under that aspect.

Discussion

I

The trial court's analysis is for the most part sound and its consideration of the precedents exhaustive. We refer the reader to it, but do not adopt it as our own opinion. We agree with the trial court that it is not reasonable to ask the court to assess damages for a taking when it is not known just what interest is taken, or when, or for how long, and these are matters best left to be stated by the alleged taker itself. If it refuses to say, inferences can be drawn, as the Third Circuit stated. It may, however, not be at all reasonable to ask the claimant

to delay in filing his suit. If, as here, a taking claim is stated, the court has jurisdiction of the subject matter and it may do a great injustice if it dismisses, even without prejudice, a claim brought almost 6 years (the statutory period of limitations) after it first arguably accrued. As we did in *Aulston v. United States*, 823 F.2d 510 (Fed.Cir. 1987), here the sensible thing to do would be to retain jurisdiction and suspend further action pending a proper application to the alleged taker and an opportunity for it to show what its intentions are, except that the claim fails on other grounds. This is particularly true when, as here, the taker may end up the unwilling purchaser of a $200,000,000 but useless facility.

Subject-matter jurisdiction of the federal courts is initially determined according to the "well-pleaded complaint." *Gronholz v. Sears, Roebuck and Co.*, 836 F.2d 515, 5 U.S.P.Q.2d 1269 (Fed.Cir.1987). The court may determine, of course, whether it lacks jurisdiction and the well-pleaded complaint affords a sufficient starting point in answering such a question. In assessing the complaint, the court is not precluded from considering other threshold issues as well, all with the goal in mind of determining the court's jurisdiction. *Id.* The exhaustion requirement is not, strictly speaking, a matter of jurisdiction. *United States v. Priority Products, Inc.*, 793 F.2d 296, 4 Fed.Cir. (T) 88 (1986). Even if the statement of the claim in the instant complaint showed on its face, which it does not, that administrative remedies then existed which had not been exhausted, the fact still remains that between April 7, 1977, when President Jimmy Carter announced his policy, and October 8, 1981, when President Ronald Reagan announced his, no administrative remedy existed not obviously futile and a waste of time. During that period, the taking most likely occurred, if it occurred at all. If it occurred during that period, there is no mystery what the taker took. It took the entire fee. On the other hand, it is arguable from the com-

plaint that a temporary taking occurred well before the permanent one, even if no permanent taking occurred. The Supreme Court has held, in a decision that came *after* the trial court decision, that any lapse of time when use of property was delayed by the deliberations of administrative bodies must, if it qualified otherwise, be dealt with as a temporary taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, — U.S. —, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The decision torpedoes the assumption of the California courts that a dispute over what the alleged taker can do without incurring just compensation liability must, if the taker is wrong, be resolved by injunctive relief alone, with no money damages, because otherwise the alleged taker is made into a real one without ever intending to take that role. In federal law, of course, the governmental entity is made into an involuntary purchaser and may end up owning property it does not want, by operation of the Tucker Act, which does not have a California counterpart. The idea of a temporary taking while deliberations drag on is applicable to federal acts and obviously not anticipated by the trial court.

Accordingly, we hold that the Claims Court had jurisdiction. In view of this, the trial court properly passed beyond the threshold exhaustion issue to examine whether the expectation of being awarded an operating license was a property right protected by the fifth amendment.

II

We think the basic rule that is dispositive here is that as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public. *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). Too late to have been noted by the trial court, there has been an interesting development regarding that century-old case. A major constitutional holding in its day, its

authority had been thought impaired by later cases and particularly by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). We touched on this idea in *Florida Rock*, 791 F.2d at 900, because then Chief Judge Kozinski, deciding *Florida Rock* for the Claims Court, had raised the question. We thought, however, in the hypothetical event of a landowner leaking a septic fluid into the Miami drinking water, *Mugler* would be found very much alive as a precedent. The rule of *Mugler* is drastic indeed. Kansas had adopted by constitutional amendment—the first of its kind in the nation—strict prohibition of manufacture and sale of all alcoholic beverages. This rendered Mugler's brewery of no value and he contended it had been taken without just compensation. The 1887 Supreme Court held that state action under its "police power" to protect the "public health, the public morals, and the public safety," cannot be a taking. Moreover, the legislative judgment as to what measures were appropriate in exercise of that power was not for judicial review.

Now in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, — U.S. —, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the Supreme Court has dusted off *Mugler* and put it back on its pedestal, while reducing *Pennsylvania Coal Co. v. Mahon* as a precedent pretty much to its own peculiar facts. Mugler commenced his business, so far as appeared, before any scheme of licensing existed that he might have arguably accepted as a condition. There was not in *Mugler* any attempt to justify the regulation by showing Mugler was not hurt so much as might appear. This has been a feature of modern regulatory taking cases, including *Keystone*. Nor had he any administrative remedy he had not exhausted. The dissent in *Keystone* agrees that a compensable taking does not necessarily occur when the government uses its authority to prevent a property owner from using his property so as to injure others, but argues that this, which it calls the

"nuisance exception," does not apply to every case when the state uses its police power to curtail private rights.

A later case, also rehabilitated as precedential, is *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915). We must, of course, transpose these statements from actions by states to those of the Federal Government. The state police power, as now described by the Supreme Court, no longer includes protection of "morals" but "welfare" is added. These changes do not concern us. The Federal Constitution exists, as stated in the preamble, for "the common defence." There can be no doubt that President Carter considered nuclear proliferation was a threat to that defense, and that consequently the processing of spent fuel at the Barnwell plant was a danger he must avert. In *Radioptics, Inc. v. United States*, 223 Ct.Cl. 594, 621 F.2d 1113, 1127 (1980), one of our predecessor courts stated that: "where the purpose of a regulation which causes interference with property rights is to prevent injury to the public welfare as opposed to merely bestowing upon the public a nonessential benefit, compensation under the fifth amendment is not required."

The Third Circuit holding in *Westinghouse Electric Corp.* would constitute a collateral estoppel on the parties to that case, if one is needed, as to that issue. This provision in our view stands, with respect to the just compensation clause, the same as state action to protect public "health, morals, and safety" stood a century ago, or "health, safety, and welfare" today. One who proposes use of property injurious to common defense stands vis-a-vis the Federal Government the same as one whose use of property would be injurious to the interests the state protects under its police power.

III

If, however, despite its absence in *Mugler*, some antecedent acceptance of the regulatory scheme by appellants here is requisite if the government is not to be liable for a taking, such acceptance occurred. Appellants do not deny they accepted the regulatory scheme so far as it might have resulted in denial of construction or operating licenses on the ground the plant, as appellants would operate it, was unsafe. They deny that nuclear proliferation grounds were within the contemplation of the parties. However, the statute required the agency to take into account the common defense and security of the nation in passing on the licenses. We cannot believe that this did not include the unforeseen as well as the predictable. The attendant circumstances: the novelty of nuclear fission, the fearsome effect of its use in war, the public fears, all forbid us to suppose that the government had committed itself to use of its licensing power not to respond to some new ground of hesitation just because it was not originally foreseen.

Use of the licensing power is invalid if it is used to accomplish some object not within the purpose of that power, *Nollan v. California Coastal Commission*, —— U.S. ——, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), but the prevailing opinion in *Nollan* concedes that use for purposes within the object of the power reserved will be valid even if detrimental to the owner's full ultilization of the property. *Id.* 107 S.Ct. at 3146-47.

IV

Appellants have much to say about the "inducement" extended to them on the government's behalf to obtain the commitment of private capital that occurred. There was extended negotiation, with much "jawboning" on the government's part, with tender of technical assistance, and the government also furnished the land. This

history of direct negotiation is unusual in regulatory taking cases, and we have not much guidance in the precedents to aid our deliberations.

We find the absence of a contract count in the complaint to be dispositive. One undoubtedly would be there if the existence of a contract right would be arguable, and one is present in the companion case, *NL Industries v. United States*, 839 F.2d 1578 (Fed. Cir. 1988), argued before the same panel the same day. Contract rights enforceable in the Claims Court include not only express contracts, but also contracts implied in fact. For example, in *Padbloc Co. v. United States*, 161 Ct. Cl. 369 (1963), the government was held to be liable to pay just compensation on an implied contract theory if it misappropriated and used intellectual property not amounting to a patent or copyright, and submitted under restrictive clauses for the purpose of making a sale. *Padbloc* is explained and limited in *Radioptics, Inc., supra.* Likewise, before enactment of the present 28 U.S.C. § 1498, consenting to suits against the government for patent infringements by it or committed on its behalf, the holder of a patent infringed by the government occasionally could sue on an implied contract theory if he could show he had offered the invention to the government expecting to be paid and the government used it, expecting to be called on to pay. *E.g., Berdan Fire-Arms Mfg. Co. v. United States*, 25 Ct. Cl. 355, 26 Ct. Cl. 48 (1890), *aff'd*, 156 U.S. 552, 15 S.Ct. 420, 39 L.Ed. 530 (1895). Arguably, the principle would apply if the government induced private capital to embark on a project, expecting for its part to be called on to cooperate in making the project a success, or at least to do nothing harmful, and the contractor invested his capital, expecting it to be sheltered from adverse government action. We do not so decide, but in any event, the assertions about "inducement" in this case are not such as would support a good faith count pled along the line

suggested. We think the hypothetical is the nearest to our actual case the law would go—if it went that far—in attaching significance to "inducement" by the government to private parties to invest their capital in a business enterprise. After all, when the government desires reluctant private capital to invest in risky enterprises, it is accustomed to make express contracts to "induce" by reducing or sharing the risk. The constitutional control of Congress over the public fisc is an adverse factor against liability for mere "jawboning" by government employees not authorized to commit it to legal liability. *NBH Land Co. v. United States*, 217 Ct. Cl. 41, 576 F.2d 317 (1978). *See also Empresas Electronicas Walser, Inc. v. United States*, 223 Ct. Cl. 686, 650 F.2d 286 (1980).

Conclusion

The judgment of the Claims Court is reversed respecting the unripeness of the complaint and dismissing without prejudice. It is affirmed respecting its fifth amendment holding, and the cause is remanded with directions to dismiss the complaint with prejudice.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES CLAIMS COURT

No. 229-83C

NL INDUSTRIES, INC.

v.

THE UNITED STATES

May 22, 1987

Herbert L. Fenster, Washington, D.C., for plaintiff; David A. Churchill, Tami Lyn Azorsky, and McKenna, Conner & Cuneo, of counsel.

Terrence S. Hartman, Washington, D.C., with whom was Asst. Atty. Gen. Richard K. Willard, for defendant; David M. Cohen, Director, Dept. of Justice.

OPINION

YANNELLO, Judge.

The complaint in this case essentially alleges two causes of action, one based on an alleged taking under the fifth amendment and one on an alleged breach of contract. The issue presently before the court concerns defendants' motion to dismiss the taking claim for failure to state a claim. (A separate motion, filed February 1986 addresses plaintiff's claim founded on contract and has not yet been argued before the court.)

This court is aware of the many decisions admonishing courts to examine each case on an ad hoc basis and,

further, advising that such examinations are usually very fact-intensive and rarely capable of resolution by dispositive motion. In the instant case, all of the complex factual background is stipulated and there are no disputes of material facts for the purpose of the pending motion. In that motion, defendant has suggested that notwithstanding all the facts as alleged by plaintiff, NLI's complaint fails to set forth, as a matter of law, a claim for compensable taking. The court now addresses that motion given the particular factual circumstances here present.

I. *Statement of Facts*

The background facts, not in dispute, are set forth in full in the opinion (including Appendix) issued this date in *Allied General Nuclear Services (AGNS), et al. v. United States*, 12 Cl. Ct. 372, to which the instant case is related; these facts are incorporated by reference, and will not be fully restated, herein. (To the extent that issues of jurisdiction discussed in *AGNS* are also applicable here, they are incorporated by reference.)

It suffices to say here that, since the early 1950's and the enactment of the Atomic Energy Act of 1954 (the "AEA"), 42 U.S.C. §§ 2011-2282 (1976 and Supp. V. 1981), the government, through appropriate agencies (including the, now, Nuclear Regulatory Commission (NRC)), has encouraged private enterprise to enter into the nuclear fuel and nuclear power industry. The extent of the government encouragement, exhortation, and inducement directed toward private enterprise in this regard is described in full in the *AGNS* appendix and is, for the purpose of the instant motion, deemed to be established.[1]

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[1] With the passage in 1970 of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, environmental concerns also were a factor in the nuclear power industry, but, for the most part, these concerns are not at issue here.

Part of that industry, with which we are not now concerned, involves utility plants using nuclear power to generate power. These plants use fuel containing nuclear components such as plutonium, which is also a component of nuclear weaponry. At the end of the fuel cycle, the spent fuel, which contains quantities of nuclear components, may be either disposed of or reprocessed.

The central focus of this case is the reprocessing of spent fuel, which has been encouraged by the government inasmuch as such recycling reduced the need for uranium by the utility plants and reduced the disposal of waste, containing nuclear material, from the utility plants. (The related *AGNS* case referred to above concerns chiefly the construction and operation of a reprocessing plant.)

A transportation system was also an integral part of the chain between the utility plants and the reprocessing plants (and presumably, of the waste disposal process as well).[2] Such transportation system is of particular importance in the instant case involving plaintiff NL Industries (NLI). In connection with the pending motion to dismiss, many of the facts are taken from the complaint and are presumed to be established for the purposes of the motion.

In order to induce private investment, the government entered into contracts with the utility companies to provide the "back-end" of the fuel cycle, *i.e.* use government facilities to receive spent fuel—with financial settlements with the utilities, and to provide reprocessing and transportation services until these were available from private

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[2] A waste disposal program is presumably necessary either for the non-reprocessed spent nuclear fuel from the utility plants or the waste by-products of the recycling process (which would contain less nuclear material than the non-reprocessed spent nuclear fuel.) *See also* the recent Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* This aspect of the industrial chain, like the utility plants themselves, is not involved in either the *AGNS* or *NLI* cases.

commercial facilities. (These contracts are not at issue here.)

NLI became involved in the nuclear industry in the late 1950's, when it designed and manufactured lead cask transportation systems for nuclear submarine cores on behalf of the United States Navy's nuclear submarine program. NLI was also the first company to ship irradiated fuel from Canada to and from research reactors throughout the country. NLI had been targeted by the Government as an excellent potential candidate to design and manufacture transportation systems for spent nuclear fuel.

In 1968, the government's agency issued reports estimating that the volume of spent fuel to be transported through 1980 was $25 to $30 million, or, alternatively, that shipping costs by the year 2000 would be between $136 and $202 million. This report also stressed the need for commercial involvement in the transportation of spent fuel in order to complete the fuel cycle, and noted that NLI's predecessor was one of only three companies in the United States that had the capability to design and fabricate spent fuel shipping containers.

In 1971, AGNS, having previously received a construction permit from the government, began construction of a reprocessing plant (known as Barnwell or BNFP). At that time, NLI entered into an agreement with AGNS to design and supply the entire transportation systems for the reprocessing facility.[3] All components of this transportation system were required, by statute, to be certified and licensed by the government.

NLI owned a plant in Wilmington, Delaware, where transportation systems were fabricated. Fabrication of

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[3] The parties apparently entered into a letter of agreement and, as defendant acknowledges for purposes of the pending motion, plaintiff's allegation that it had a contract with AGNS is accepted as fact.

a transportation system was begun in 1973. By 1977, NLI had invested $15.5 million in the design, licensing, labor and materials relating to the transportation systems for Barnwell and had completed manufacturing five truck systems and two rail systems, with raw material on hand to build several additional systems.

For ease of reference in the discussion below, plaintiff's plant, together with its equipment, completed inventory of truck and rail systems as described above, work-in-progress, raw materials, and the licenses granted by the government to NLI with respect to such transportation systems, shall all be referred to as either "physical property" or "realty" or "real property".

By 1977, the government had issued certificates of compliance for NLI's rail and truck systems, which were in conformity with all relevant licenses and permits issued by the government (and which satisfied the terms of NLI's contract with AGNS). Moreover, the transportation system itself was specifically approved by the government. Thus, NLI had met the statutory regulatory requirements, and was prepared to furnish the needed transportation system to AGNS, or to any other licensed reprocessing plant.

Accordingly, NLI was not directly *involved* in subsequent events concerning the licensing procedures for the reprocessing plants themselves. However, inasmuch as NLI provided an integral service in the chain of the nuclear power industry, particularly in the reprocessing of spent nuclear fuel, it was directly *affected* by the results of those procedures which would permit reprocessing plants to operate.

NLI, like the plaintiff in *AGNS*, focuses on the events of 1977. These events include an announcement by President Carter, who expressed concern over prolifera-

tion of nuclear materials and weapons, particularly in the context of international relations and foreign policy.[4] The President stated that the government would defer indefinitely the commercial reprocessing and recycling of the plutonium produced in domestic nuclear power programs, and that AGNS's Barnwell plant would receive neither federal encouragement nor funding for its completion as a reprocessing facility.[5]

Of more immediate interest is the government's concommitant imposition, in 1977, of a moratorium (which the plaintiff characterizes in its complaint as an indefinite suspension or a termination) in the proceedings concerning AGNS's application for a license to operate the Barnwell reprocessing facility. (For a fuller discussion, *see also* the Appendix to the opinion in *AGNS.*) Plaintiff alleges that this action effectively dismantled the entire private nuclear fuel reprocessing industry.[6]

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[4] *See also* the Nuclear Non-Proliferation Act of 1978.

[5] The President's 1977 announcement had no direct impact upon the statutory regulatory process, since the President did not directly administer that process. However, as chief executive, the President's position led indirectly to action by the executive agency which administered that process, causing it to alter its policy and modify its proceedings accordingly.

[6] A discussion of the moratorium appearing in *Westinghouse Electric Corp. v. United States,* 598 F.2d 759 (3d Cir. 1979), and summarized in the Appendix to the *AGNS* opinion, suggests that the moratorium was permissible under the statute, but only for a limited duration. (This might raise in any subsequent further proceedings in this case, the question of whether any alleged taking was of a permanent or temporary nature. *See, e.g., United States v. Riverside Bayview Homes,* 474 U.S. 121, 106 S.Ct. 455 at n. 6, 88 L.Ed.2d 419 (1985)).

Nonetheless, plaintiff NLI alleges that, as a result of the termination of deliberations concerning applications for licenses to operate the reprocessing plant, "there was simply no remaining market for spent fuel transportation". Complaint, ¶ 44. Plaintiff also alleges that its physical property was taken, and was virtually unusable,

Plaintiff contends that this termination of the industry in turn rendered plaintiff's property entirely valueless, thereby effecting a taking thereof, under the fifth amendment, for which just compensation is due.[7]

The plaintiff has essentially described four items of property allegedly taken:

1. Physical property (or real property as described above) including its truck and rail systems and its fabrication plant.
2. Rights under a contract with AGNS.
3. Rights under a contract with the United States.
4. Investment-backed expectations in the existence of a long-term market for transporting spent nuclear fuel for the reprocessing industry.

Plaintiff's allegations are set forth in the complaint.

Defendant, in a motion to dismiss for failure to state a claim upon which relief can be granted, argues that as a matter of law, there can be no claim upon which relief can be granted for a taking under the facts as alleged, for a variety of reasons discussed below. The pending motion assumes that the allegations set forth in the com-

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"upon termination of the nuclear reprocessing industry". Complaint, ¶ 45.

In essence, plaintiff alleges that the imposition of the moratorium (that is to say, the termination of the deliberative proceedings designed to consider applications for operating permits such as that of AGNS) effectively resulted in the dismantling of the entire enterprise. Defendant's arguments in its motion are not founded on any contention to the contrary. For the purposes of the pending motion to dismiss, such allegations are accepted as fact.

[7] For purposes of the pending motion only, it is assumed that the property was rendered valueless. In any further consideration of whether a taking has occurred, further proceedings will be necessary to determine whether, in fact, the plaintiff has indeed been deprived of the economically viable use of its property.

plaint are fact and contends that, even based on such facts, no claim has been stated.[8]

The discussion of these contentions follows.

II. *Discussion*

A. *Regulatory Action: Presumption of Correctness*

This court lacks jurisdiction to review allegations of tortious government action or to award money for violations of general regulatory statutes, such as the AEA, which do not contain any express provision allowing for monetary damages. *See, e.g., Eastport Steamship Corp. v. United States*, 178 Ct.Cl. 599, 608-09, 372 F.2d 1002, 1009 (1967).

Accordingly, for the purpose of any taking claim in this court, the regulatory action by the government is presumed to have been authorized and to be correct within the provisions of the governing statute. *See, e.g., Florida Rock Industries v. United States*, 791 F.2d 893 (Fed.Cir.1986). Indeed, in the instant case, like the situation in *Deltona Corp. v. United States*, 228 Ct.Cl. 476, 657 F.2d 1184 (1981), the correctness of regulatory ac-

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[8] As the questions are now presented before this court, it may be determined, if defendant is correct, that as a matter of law no taking has been stated in the complaint for which compensation is due. The converse cannot be found, *i.e.*, that a taking, for which compensation is due, *has* occurred as alleged by plaintiff. It could only be determined, if defendant's arguments are not accepted, that the allegations of the complaint are sufficient to warrant consideration of the merits; that a compensable taking *could* have occurred and that a claim for compensable taking exists and/or is not ruled out as a matter of law. Among the many issues which have yet to be addressed are the questions concerning the diminution of the value of plaintiff's property. Therefore, this opinion addresses only the arguments raised in defendant's motion to determine whether, in law, plaintiff has for the reasons raised by the motion, failed to state a claim.

tion has been specifically reviewed and affirmed, at least with respect to the imposition, in 1977, of a moratorium in the government's consideration of pending applications for operating licenses, for the purpose of completing a study which was expected within two years. (*See Westinghouse Electric Corporation v. United States*, 598 F.2d 759 (3d Cir.1979), in which the instant plaintiff, together with the plaintiff in *AGNS*, *supra*, joined as parties.)[9]

Thus, for purposes of this action, it is assumed that the government acted properly in its regulatory role. It is alleged, however, that even this proper exercise of authority has resulted in a taking of plaintiff's property for which it should receive just compensation under the fifth amendment.

B. *Regulatory Action: As a Taking*

The fifth amendment provides, essentially, that private property shall not be taken for public use without just compensation. The Constitution does not further address what shall constitute a taking "for public use".

Any property owner aggrieved by governmental action, and believing such action to constitute a taking requiring just compensation, addresses his concerns in the courts, seeking redress there. *See, e.g., Monongahela Navigation*

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[9] The study was completed in March 1980, as anticipated in the *Westinghouse* decision which referred to a moratorium of approximately two years. After issuance of that report, however, the government did not reopen or recommence the proceeding to consider pending applications for licenses to operate reprocessing plants, such an application by AGNS being then pending, nor did the applicant AGNS seek such reopening. (As will be discussed in greater detail below, NLI did not require any license other than that which it had already received, and thus played no direct role in the proceedings which had been suspended.) In any event, for purposes of a taking claim asserted in this court, the government action must be deemed appropriate and correct.

Co. v. United States, 148 U.S. 312, 327, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1982).

At one time, the courts, and particularly the Supreme Court, construed the clause as requiring just compensation only for those taking by virtue of which the United States actually physically occupied or used the property. In like vein, the courts viewed a compensable taking as having occurred when the government so used neighboring property as to virtually exclude another property owner from his own property.

With respect to plaintiff's physical or real property as described above, defendant argues that this case falls outside that category of cases where a taking "is most likely to be found" because: (1) there has been no actual physical invasion of plaintiff's property by the government; (2) there has been no use of the property by the government; and (3) there has been no exclusion of plaintiff from its property. (Moving brief, pages 37-43.) The factors listed by defendant may be construed as the "basic" elements deemed necessary to constitute a compensable taking of the most common type and under what might be termed the earlier or more traditional view.

We reject defendant's contention, however, and note the now well-established doctrine, by which we are bound, and which might perhaps be termed the modern view, that government action (including the implementation of its police power in protection of the public) can, in appropriate circumstances, constitute a taking even though the elements cited by defendant are absent.

For example, in *Deltona*, 228 Ct.Cl. at 486, 657 F.2d at 1190 (1981), the Court of Claims stated:

> It is well established as a matter of law that government regulation can effect a Fifth Amendment taking. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 [98 S.Ct. 2646, 2658,

> 57 L.Ed.2d 631] (1978) (no taking found on the specific facts of that case); *Benenson v. United States*, 212 Ct.Cl. 375, 388, 390, 548 F.2d 939, 947, 948 (1977) (taking found). The rationale, as stated by Justice Brennan, is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652, 101 S.Ct. 1287, 1304, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting). [Footnote omitted.]

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Supreme Court recently stated:

> As has been admitted on numerous occasions, "this court has generally 'been unable to develop any "set formula" to determine when "justice and fairness" require that economic injuries caused by public action' " must be deemed a compensable taking [compensated by the government, rather than remaining disproportionately concentrated on a few persons.] The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. The court has, however, identified several factors that should be taken into account when determining *whether a governmental action has gone beyond "regulation" and effects a "taking"*. Among these factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." [Citations omitted.] [Emphasis supplied]

See also Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1558 (Fed.Cir.1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) and *MacDonald, Sommer & Frates v. Yolo*

County, et al., 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

Thus, the court concludes that regulatory action of the type here involved may, as a matter of law, constitute a compensable taking, under the Fifth Amendment, even though the action lacks the elements stressed by defendant.

C. *Property Generated Under Existing Regulatory Scheme*

1. *Generally*

Defendant also contends that plaintiff's allegations fall short of stating a claim for compensable taking because the regulatory system, under which the alleged taking occurred, was in place at the time plaintiff acquired or developed its property interests. (Indeed, absent the AEA and attendant regulations, there would be no private nuclear power industry into which plaintiff might enter.) Thus, contends defendant, the consequences of regulatory action were known to plaintiff and/or were foreseeable; plaintiff, choosing to proceed subject to such regulatory system, should bear the burdens and risks of any losses occasioned by the implementation of that system.

The contentions of the parties in this regard actually raise two issues, one factual and one a matter of law.

The first issue is factual, namely, whether the actual regulatory action beginning in 1977 was foreseeable at the time plaintiff generated or acquired its property interests, given the technology and state of the world at the time of such acquisition. To this extent, defendant can point to no failing or deficiency in plaintiff's allegations.

Indeed, plaintiff asserts that it neither knew nor could have foreseen the intervention of concerns for international nuclear proliferation in the determinations con-

cerning the future of the domestic nuclear reprocessing industry. Moreover, plaintiff alleges that only the government was in a position to evaluate such concerns and it divulged no information during the long periods of plaintiff's investment in the industry. Further, plaintiff alleges that the government, although initially aware of the possibility of nuclear proliferation, did not consider this a concern in furthering the domestic nuclear reprocessing industry. (*See, e.g.*, Complaint, ¶¶ 16, 22, 23, 33.) In its briefs, plaintiff contends that the actions of the government, while consonant with the statute's requirement that deliberations on license applications include consideration of the public health and safety and common defense and security, were nonetheless a total, and unpredictable, reversal of previous government policy.

For the reasons set forth below, however, this court does not view these factual allegations, even if established at trial, as determinative of the issue.

The second issue is one involving primarily a question of law. In essence, the argument advanced is that no compensation is due for any taking (by regulatory action) of property which is acquired while the regulatory system is in effect and which is thus subject thereto. Under this theory, it would be irrelevant whether the regulatory action (beginning in 1977 and allegedly accomplishing a taking) resulted from known (and foreseeable) or unknown (and unforeseeable) developments or advances in technology, the state of the art, the state of the world, or otherwise.

After examining these factual and legal issues, this court subscribes to the view that the matter is subject to resolution primarily as a matter of law. It is the very existence of the regulatory scheme which is, as a matter of law, dispositive of the matter. So long as regulatory action (of whatever nature) is contemplated, it does not matter whether the events which give rise thereto were or should have been foreseen by the property owner when

acquiring or generating its property interests. Changes in the state of the art, and similar changes, are always possible, and indeed, it has been said that change is inevitable. It is the existence (prior to property acquisition) of a system, whereby regulatory agencies may respond to such changes, which is determinative of the issue of foreseeability.

In this connection, it should be noted that the regulatory action here involves the implementation of jurisdiction and of substantive standards or criteria which existed at the time of property acquisition and which remained constant. *See, e.g., Westinghouse, supra.* The standards to be used in considering applications and granting permits were constant—public safety and common defense—and plaintiff has neither alleged nor shown any changes in the statute's regulatory scheme.[10] The increasing emphasis on and awareness of international nuclear proliferation, as a consideration of such standards, does not alter the preexisting standards or scheme.[11]

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[10] For example, in considering applications to market certain drugs, the criterion for approval may be considerations of public safety. If this criterion is in existence both at the time of property acquition [sic], there may be no claim for compensable taking. This would hold even if the regulatory action was (1) occasioned by changes in the technology of scientific testing, or by the generation or development of additional and new data or (2) occasioned by a change in the significance attached by the agency to tests or data developed earlier.

If, however, the standards of regulatory action is based on the imposition of a new standard (*e.g.*, adding efficacy as well as safety to the considerations), then the possibility of a taking may exist.

[11] The parties here make only passing reference to the Nuclear Waste Policy Act of 1982 (42 U.S.C. § 10101 et seq.) but make no clear assertion that this Act forms any basis of the present claim. Indeed, it might be argued that that statute clarifies the Congressional expression of the same types of considerations or standards of "public safety and common defense" already contained in the 1954 AEA which gave rise to the agency regulatory action already in issue here. (*See also* fn. 2 above)

Indeed, the courts, in attempting to determine whether a compensable taking has occurred, have focussed on such elements as whether the private property owner could "claim to be surprised" by the government's exercise of its authority, or whether the possibility of government action was clearly present, or whether the party had sufficient opportunity to consider these risks. *See, e.g., Shanghai Power Co. v. United States*, 4 Cl.Ct. 237 (1983), *aff'd.* 765 F.2d 159 (Fed.Cir.1985), *cert. denied*, 474 U.S. 909, 106 S.Ct. 279, 88 L.Ed.2d 243 (1985).

There is impressive support for defendant's contention. The Court of Claims reached a similar conclusion in *Eastport*, 178 Ct.Cl. at 612, 372 F.2d at 1011-1012 (1967). There the court found that no compensable taking had occurred when the government's role "was simply part of a preexisting regulatory process known to plaintiff from the time it purchased [the property], and the [agency's] failure to give its approval within the necessary time took no property from plaintiff any more than a comparable failure by [various named regulatory agencies]." [12]

Language in the *Deltona* decision, *supra*, also suggests support for defendant's contention, particularly the following, 228 Ct.Cl. at page 487, 657 F.2d at page 1190:

> The crucial factor in this case is that since the late 1960's the regulatory jurisdiction of the Army Corps

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[12] In *Eastport*, relief for the commercial losses sustained by plaintiff was also denied for another reason. The court noted the plaintiff's allegation of wrongful or improper government action—namely, the delay by the agency in implementing the regulatory process (and in acting on plaintiff's application for a permit). The court, 178 Ct.Cl. at pages 608-09, 372 F.2d at pages 1009-1010, found that the regulatory legislation contained no provision for monetary award in the event of wrongful government action (and thus the claim would be beyond the court's Tucker Act jurisdiction, 28 U.S.C. § 1491) and that the court did not have jurisdiction over tort claims against the government.

> of Engineers has substantially expanded pursuant to [the statute] and—under the spur of steadily evolving legislation—the Corps has greatly added to the substantive criteria governing the issuance of dredge and fill permits within its jurisdiction. * * *
>
> Moreover, when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assurance that the permits would issue, but only an expectation.
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> * * *

Id. at 491, 657 F.2d at 1193.

(This was not, however, the sole basis for the court's decision.) [13]

Likewise, in *Florida Rock, supra*, the Federal Circuit continued the expression of the view which was earlier stated in *Eastport* and *Deltona* and held that a taking well may be found to have occurred, using the appropriate criteria of evaluation, where, as the trial judge found, the plaintiff need not have foreseen the statutory amendments (following plaintiff's acquisition of its property) which led to the restrictions on its use of its property.

Recently, in *Monsanto, supra*, the Supreme Court furthered this view by holding that: (1) deprivation of

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[13] It should be noted, however, that the court, in *Deltona*, did not stop its discussion with the foregoing observation. Rather, the court proceeded to examine the extent to which plaintiff's property value had been impaired. Ultimately, the fifth amendment claim in *Deltona* was denied on the basis that while some diminution in the value of plaintiff's property had occurred, it still retained an economically viable use.

property rights pursuant to statutory terms in existence at the time the property was generated would not constitute a taking; whereas (2) deprivation which is contrary to the terms in existence at the time the property is generated could constitute a compensable taking.

Thus, as a general proposition, defendant's argument is well taken and may indeed be persuasive in circumstances presenting no additional or unusual factors.

2. *Special Circumstances*

Plaintiff, however, points to circumstances here, perhaps somewhat unique, which would arguably alter this result. NLI points to the doctrine reiterated in *Monsanto, supra*, requiring an *ad hoc* examination of each case to determine, ultimately, whether the burden of the government's regulatory action should be borne by the public generally or by the specific property owner. In this connection, the plaintiff relies upon the fact that the government sought-out, exhorted, facilitated and induced private industry generally, and plaintiff specifically, to enter this commercial market. These facts are not disputed, and are adopted by the court, for the purposes of this motion. *See also AGNS, supra*, appendix.

Because of the nature of this argument, it is important to stress at the outset that no express or implied (in fact) contracts with the government are involved here. (While plaintiff does allege the existence of such contracts, such separate counts of the complaint are the subject of a separate motion and are not addressed herein. *See also* discussion in section E *infra.*)

The plaintiff's novel argument is not without some appeal. The enterprise involved here was not only subject to regulation but was fledgling, newly developing, and somewhat speculative, requiring extensive capital investment by private industry and involving new and highly complex technology. Moreover, as the government ex-

horted, it was expected to ultimately be of great benefit to the public.

Nonetheless, the court is not persuaded of the merit of this claim. Entrepreneurs were not compelled, under any duress, by the government to enter this market. Rather they may have been attracted by the anticipated long term growth (with attendant revenues and profits). Moreover, private industry could have refused to enter this market without certain protection.[14] In short, despite the ultimate and extensive public purpose advanced by the government, private entrepreneurs were solely responsible for their ultimate decision to participate in this market; they alone would benefit financially from success and they alone must bear the monetary losses from their investment.

3. *Summary*

Based on the foregoing, it is concluded generally, and as a matter of law, that the factual allegations here fall short of stating a claim for a compensable taking for various reasons: (1) the property was acquired, generated, and developed, well-within a preexisting regulatory scheme which subjected property to the possibility of the imposition of the limitations now complained of; and (2) government encouragement of plaintiff's acquisition of this property does not give rise to or provide support for a taking claim.

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[14] For example, private parties could contract to build ore processing plants for government ownership and purchase. Separate operating contracts (perhaps with stated fees) could subsequently be entered into. (Government owned-contractor operated or GOCO plants are not unheard of particularly in unique industries involving public safety or where the volume of usage is uncertain.)

Whether the government would have entered into such contracts is unknown but industry was free to abstain from entering this field of commerce except upon such terms as it felt afforded adequate protection.

Additional aspects of Plaintiff's claim as to specific types of property allegedly taken are set forth below.

D. *Plaintiff's Physical or Real Property*

As pointed out in the preceding factual statement, NLI owned physical property, including a building, inventory, work in progress, and materials. In addition, as pointed out above, NLI had obtained all licenses necessary to furnish its transportation system to any licensed reprocessing plants.

NLI expected to provide services to AGNS, in pursuance of which expectation NLI entered into a contract with AGNS and made a considerable capital investment in the construction of its transportation system. Moreover, NLI was encouraged by the government to anticipate a large reprocessing industry—with growth throughout the remainder of this century—in pursuance of which anticipation NLI dedicated its plant; the design and construction of an acceptable transportation system, in consultation with the government; and the obtaining of necessary licenses.

At the time of the events in issue (beginning with the Presidential announcement in early 1977), NLI had not only physical property but also all necessary licenses to enable it to provide a transportation system to the reprocessing industry. And that industry had been expected to include not only AGNS but any other reprocessor who was permitted by the government (which anticipated the growth of a rapidly expanding industry) to construct and operate a reprocessing plant. NLI had expectations, backed by considerable capital and technological investment, of exercising its rights, under existing licenses (and pursuant to the alleged contract with AGNS—the existence of which enforceable contract is presumed for the purposes of the instant motion) to provide such transportation services.

In this circumstance, NLI may be said to differ from the plaintiff in *AGNS*. Unlike AGNS, NLI had not only physical property, but the licensed right to construct and provide the transportation services to a reprocessing industry. It was the constriction of this industry by the events in issue (*e.g.*, the moratorium beginning in 1977) which, for the purposes of the instant motion, caused the alleged total loss of plaintiff's property.

Moreover, inasmuch as NLI had obtained the permission of the government as to the design and use of its transportation system, it had (assumedly for the purposes of the instant motion) no further obligation to seek the issuance of licenses from the government. NLI had no active or direct role in the licensing procedure which affected the construction or operation of the reprocessing plants which would form an important part of the anticipated reprocessing industry.

Thus, the government's regulatory action did not directly impede plaintiff's authority or ability to design, construct, and use its property; indeed, all necessary permits had issued to NLI. Rather, the frustration of plaintiff's invesment-backed expectations stemmed from the government's regulation of the primary industry (i.e., the licensing of reprocessing plants like that of AGNS), which to NLI was to provide a service.[15]

In addition to the reason set forth above concerning regulatory taking, this court is not prepared to extend the doctrine of "regulatory taking" so as to render compensable such indirect government action. One primary cause for this reluctance is the speculative nature of such a claim. Apart from specific contracts for services or with suppliers, the industry, even if licensed to operate, may not have availed itself of plaintiff's property for any number of reasons. For example, during the license

[15] To the extent that recovery may be sought for firm contracts with the industry, the matter is treated separately below.

process, AGNS, in 1980, undertook negotiations (albeit unsuccessful) to sell its plant to the government (which already owned and operated a similar, and adjacent, plant at Savannah River); whether the government, like private industry, would avail itself of NLI's services is open to question.

Here, then, plaintiff NLI is precluded from recovery for two reasons. First, as discussed above, it acquired the property, to service a regulated industry, under a preexisting scheme which might, at anytime, withhold or revoke licenses under which the industry operated. Moreover, even apart from direct regulatory action, NLI was subject to the vagaries of the industry itself.[16] This court is not of the opinion that recovery should lie.

E. *Plaintiff's Contract with United States*

The third type of property identified by plaintiff, relating to its rights under a contract with the United States, was described during oral argument, pursuant to the court's inquiry, as involving a contract implied-in-fact. The existence (and breach by the government) of this contract is contained in Counts II through IV of the complaint. (In connection with this contract claim, some of the facts alleged in connection with the government's inducement of industry may again be asserted.)

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[16] Another example may be of assistance. If the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq. (1982), were to be amended so as to suddenly regulate, and prohibit, the marketing and sale of tobacco products, the sellers of such products, like cigarettes, might sue for compensation for their unsalable stock. Those suppliers of such component items as, indeed, planted or harvested tobacco for imminent future supply would (again apart from specific supply contracts) be no more directly affected than if the retail industry itself (voluntarily) determined to cut-back sales or substitute non-tobacco products. Only if the government prohibited the growing of the substance could such suppliers claim, perhaps, a compensable taking. Plaintiff here has not shown any such prohibition upon *its* licensed activities.

The government has separately moved to dismiss the contract claim altogether (arguing, *inter alia* and at page 11 of its moving brief, that no such contract exists). That motion has not yet been ruled upon and it has not yet been determined whether there does indeed exist a contract implied-in-fact.

Again, the court recognizes that in a motion to dismiss, such as the one now pending with respect to the taking claim, the allegations of the complaint are taken as established. However, here the motion relates only to the taking claim (Count I of the Complaint) and only the factual allegations relevant to that claim are taken as established. This motion to dismiss does not assume, for its purposes, the fact of the existence of a contract implied-in-fact.

Accordingly, it is inappropriate at this time to address whether plaintiff has failed to state a taking claim with respect to such alleged contract. If and when it is determined that a contract-in-fact has been established (and the extent, if any, of the terms of such a contract), plaintiff's claim that its rights under such a contract have been "taken" may be reexamined. At that time defendant may, if it chooses, reassert any defense to a claim of taking (including reassertion of the contention that plaintiff has failed to state a claim upon which relief can be granted).

To the extent that defendant's pending motion to dismiss the taking claim may be viewed as relating to that item of property described as "rights under a contract with the United States", it is denied without prejudice as premature. (Instead, it will be considered by the court as fully briefed in connection with a separate motion now pending.)

F. *Plaintiff's Contract with AGNS*

The plaintiff has characterized this claim as a taking or deprivation by the government of "NLI's rights under its contract with AGNS" and characterized the contract as "requir[ing] NLI to produce the transportation system . . . and requir[ing] AGNS to use the system produced by NLI".[17]

In this connection, defendant relies upon the Supreme Court decision in *Omnia Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1922). The Court there makes clear that a contract (and the party's rights thereunder) constitutes property for purposes of the fifth amendment just as would any physical property such as land itself.

In that decision, the Court distinguished a "frustration" of a contract right (not viewed as a compensable taking) from an "appropriation" of a contract right (which might be viewed as a compensable taking). That distinction can best be understood by illustrations, albeit somewhat hypothetical.

In the instant case, using the *Omnia* doctrine, the government might have "appropriated" NLI's rights under the contract if the government had asserted NLI's right to provide some transportation system to AGNS, in return for whatever consideration was offered by AGNS to NLI. In short, the government would have stood in the shoes of, or supplanted, a party to the contract. The government would have appropriated the contract for its own use or exercise and, had this occurred, plaintiff would be entitled to just compensation for a taking by the government.

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[17] At oral argument, in response to an inquiry by the court, counsel indicated that the complete terms of the contract are not now in the record. It is difficult to discern what rights if any NLI had under this contract; again, certain allegations by plaintiff are assumed for the purposes of the pending motion to be fact.

On the other hand, the government might have "frustrated" the rights of the parties if it had conscripted, for its own use, the transportation services which NLI had produced (and had intended to furnish for AGNS' use under the contract), or had prevented the exchange of consideration from AGNS to NLI for such services, or had otherwise rendered impossible the performance of the contract. Under the *Omnia* doctrine, such government action would not constitute a compensable taking.

In short, the Court in *Omnia* held that if the contract itself were appropriated by the government (as where the government used the contract by stepping into the shoes of a party thereto), a compensable taking occurred. If, on the other hand, only the materials which were the subject of the contract were used by the government, thereby frustrating performance of the contract by any party thereto, no compensable taking occurred.

In the instant case, the situation does not fall clearly into either of these categories. The government assuredly did not appropriate NLI's rights under its contract with AGNS; the government did not seek to supplant itself as a party (particularly in substitution of the plaintiff NLI) to that contract. Thus, in the instant case, the circumstances which might have amounted to a taking, requiring just compensation, as enunciated in *Omnia*, are absent.

With respect to acts of the government which might frustrate NLI's contract with AGNS, the situation is somewhat more complex. Clearly, there was no *physical* interference with the materials which were the subject of the contract (such as conscription, for the government's use, of the transportation systems which were the subject of the private contract). Thus, in the instant case, the circumstances which were described in *Omnia* as constituting no compensable taking are likewise absent.

Rather, here, as plaintiff argues, the contract was frustrated, so to speak, by regulatory action by the government which demobilized the spent-fuel recycling industry, rendering useless, and impossible of performance, the contract between NLI and AGNS.

Plaintiff contends that this is a distinction with a difference. Specifically, plaintiff alleges that in *Omnia* the court found no compensable taking when "part of the [physical] means of performing the contract" had been interfered with (or conscripted) by the government. Here, however, the government "appropriated plaintiff's rights under its contract when, in its sovereign capacity, it flatly prohibited plaintiff and other companies from continuing their efforts . . . to reprocess spent nuclear fuel . . . ." (Resp. br., Jan 22, 1986, p. 10.)

Essentially plaintiff distinguishes between the government's exercise of (1) its sovereignty in conscripting, for public use, property which was the subject of a contract, thereby rendering performance of the contract impossible, as compared with (2) its police power in prohibiting, for the public welfare, certain transactions or activities which were the subject of a contract, thereby rendering performance of the contract impossible.

However, in either case, the action is more one of "frustration" than of "appropriation" of the contract for its own use (as by stepping into the shoes of a party to the contract)—which appropriation alone was recognized as a compensable taking in *Omnia*.

The doctrine, announced by the Supreme Court some 60 years ago, appears recited in innumerable decisions since that time. *See, e.g., Kearney & Trecker Corp. v. United States*, 231 Ct.Cl. 571, 576-77, 688 F.2d 780, 782-83 (1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 929 (1983). The Supreme Court decision in *Omnia*, and the rule announced therein, is binding

on this court. No rule of thumb to the contrary has been cited to this court in any of the parties' arguments.

Accordingly, based on the foregoing, this court must conclude that there has been no compensable taking of NLI's contract with AGNS, based on the established doctrine of case law.

The responsibility of this court cannot end, however, with that pronouncement. However binding the *Omnia* doctrine may be, this court would be remiss if it did not point out certain curious features of that decision (and of the long line of cases which have followed it) in light of later decisions.

The Court, in *Omnia*, focussed on the government's use of the property, there the contract itself. The Court did not, at that time, recognize any taking where the government's lawful sovereign action merely frustrated performance of the contract (or, put another way, frustrated a party's use or enjoyment of the property, namely the contract). The Court echoed such sentiments as might be found in *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

For example, this court notes the following passages in *Omnia*, 261 U.S. at 508-09, 43 S.Ct. at 437-38:

> There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property. *See Calhoun v. Massie*, 253 U.S. 170 [40 S.Ct. 474, 64 L.Ed. 843] . . . . This Court said [in *Calhoun*] (pp. 175-176 [40 S.Ct. at p. 476]):
>
> "An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of prop-

erty values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results." [Citations omitted.]

However, the case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1974), *reh'g. denied* 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978), and many cases decided since that time, have recognized that a lawful government action, such as regulatory action or exercise of the police power, may be of sufficient extent as to constitute a compensable taking (as where, *e.g.*, it deprives an owner of any viable use of its property, taking into account such various factors as reasonable expectations backed by investment and foreseeability of the imposition of such regulatory scheme). *See, e.g.*, the *Monsanto* and *Bayview Homes* cases cited above.

By way of further example, in *Deltona, supra*, the Court of Claims addressed the very type of regulation referred to in the *Omnia* quote above, restricting the use to which land might be put during development. The court there stated that a compensable taking might occur in such circumstances (but held that such taking did not occur because the plaintiff was not deprived of all economically viable use of its land).

If as the Supreme Court declared in *Omnia*, contracts are property like any other form of property, it might now be questioned whether indeed the government could, by regulatory action or the exercise of its police power, so extensively "frustrate" the purposes of a contract (or a party's right to perform thereunder) as to go beyond regulation and become a taking.[18]

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[18] Although the Court determined that a contract was like any other property, in the context of the *Omnia* decision, it cannot be separated, by this court, whether the Court would hold likewise for purposes of a "regulatory taking".

Any conclusion that such a taking might occur, of course, does not merely go beyond *Omnia* but is inconsistent with it. Accordingly, it is not for this court to issue such pronouncement. Nor does this court, by this discussion, presume to determine whether the particular instant case would, now or at any other appropriate time, provide an adequate or appropriate vehicle for seeking the issuance of a writ of certiorari. Rather this court, merely adds its comments in and of the full, proper and responsible exercise of its jurisdiction, and with due deference to the proper jurisdiction of other courts.

G. *Market Expectations*

Plaintiff contends that it was also deprived of its property in that it was deprived of its expected market, which expectations it backed with considerable investment. Defendant argues that this property, described as an expected market for its services in the reprocessing industry, cannot, as a matter of law, be viewed as property which may be the subject of a taking for which compensation is required. (Moving brief, pages 29-35; reply brief, pages 8-10.) In addition to describing this property as "market expectation", defendant also characterizes it as loss of anticipated profits or revenues. (Moving brief, page 27.)

Defendant includes in this argument a characterization of plaintiff's expectations as mere dreams or hopes. Defendant notes, firstly, that the existence of any reprocessing industry would require the granting of licenses and that the granting of such licenses could not be viewed as "automatic" or a foregone conclusion.[19]

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[19] It is indeed true that, pursuant to the terms of the applicable statute, a license was required and a procedure for obtaining a license was established. However, at the same time (and accepting plaintiff's allegations of fact as true for the purposes of this motion), the market was clearly projected to be widespread and vital throughout this century by, *inter alia*, the government itself which

Moreover, plaintiff's anticipated profits or revenues would be generated from its market expectations generally. Thus plaintiff here is unlike the plaintiff in *Monongahela, supra,* whose anticipated revenues would result from a right, backed by law, to extract a toll under a franchise agreement.

This court would agree that, as a separate and clearly distinct property interest, plaintiff's market expectations (that is, lost anticipated revenues or profits) would not qualify as "property" within the fifth amendment. Unlike the plaintiff in *Monongahela* who had a legally enforceable right to collect tolls, plaintiff here, NLI, had no right enforceable by law to anticipated profits or revenues.

However, the court would also note that the value of existing physical property, and the licenses granted by the government, existing at the time of the alleged taking (beginning with the Presidential announcements and moratorium in 1977), if indeed a taking were to be found, would undoubtedly include a calculation for profitability just as it would for such other intangibles as good will. As the Court stated in *Monongahela,* 148 U.S. at 328, 13 S.Ct. at 627, "various elements enter into this matter of value" and among these elements are "demand for the

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published such projections to further stimulate the participation of private industry in this enterprise. Thus, the anticipation of the granting of licenses and of the consequent existence of a vibrant reprocessing industry can better be characterized not as mere hypothetical dreams but rather as the result of careful market analysis.

Moreover, defendant states that such market anticipation was "mere expectation". In taking cases, courts have long held that "mere expectations" are not property interests for purposes of the fifth amendment. However, expectations which are backed by investment do qualify as such property interests. Clearly here, and again assuming the correctness of plaintiff's factual allegations, plaintiff had made a substantial investment in this expectation.

use [of the property being taken]" as is further illustrated by the following passage:

> The commerce on the Monongahela River . . . is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner.

Thus, while the court does not recognize the anticipated market to be a separate property interest which would require that lost profits or revenues be compensated, the court does not rule out the possibility of some measure of market in the valuation of plaintiff's physical property, if a compensable taking had been found here.

Conclusion of Law

Based on the foregoing, it is determined that, assuming the correctness of all facts alleged by plaintiff, the complaint fails, as a matter of law, to set forth a claim for a Fifth Amendment taking for which compensation could be granted. Accordingly, defendant's motion is granted, and the complaint, Counts I and III, are to be dismissed. (Counts II and IV relating to breach of contract, remain pending and addressed in a separate motion.)

No Costs.

UNITED STATES CLAIMS COURT

No. 146-83C

ALLIED-GENERAL NUCLEAR SERVICES, *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

May 22, 1987

Bennett Boskey, Washington, D.C., for plaintiff; Edwin E. Huddleson, III, and Volpe, Boskey and Lyons, H. Roderic Heard, Edward T. Butt, Jr., John E. Frey, Susan L. Walker, Steven E. Danekas, David S. Rees, and Wildman, Harrold, Allen & Dixon, Chicago, Ill., Brian D. Forrow, Gerard P. Rooney, and Allied Chemical Nuclear Products Inc., Morristown, N.J., James B. Hogan, Thomas J. Smith, David L. Ream, and Valley Pines Associates, San Diego, Cal., of counsel.

Terrence S. Hartman, Washington, D.C., with whom was Asst. Atty. Gen. Richard K. Willard, for defendant; David M. Cohen, Director, Dept. of Justice, Sol. E. Leo Slaggie, Richard S. Mallory and Irwin B. Rothschild, Nuclear Regulatory Com'n, and Gregory Fess, Dept. of Energy, of counsel.

OPINION

YANNELLO, Judge.

This case was brought pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), seeking compensation of $500 mil-

lion for a taking by the United States. The matter is before the court on plaintiff's and defendant's motions for summary judgment.*

1. *Factual Background*

This court recognizes that each case in which a taking is alleged is unique. In most cases the uniqueness lies in the facts, and the development of those facts is important to the resolution of such case. Usually this factual development requires trial and the resolution of the case depends on factual findings. The situation in the instant case, however, is somewhat different.

Firstly, most of the basic facts in this case are stipulated and undisputed. (Even the facts about which there is any significant controversy have been stipulated for the purposes of the pending dispositive motions.)

Secondly, there are questions of law present in this case, and raised by the pending motions, which may well be dispositive of the entire matter. In any event, as the parties have recognized, even if the case were not resolved on the basis of these motions, a trial would be appropriate only after resolution of these legal issues since the scope of trial may be affected thereby. Accordingly, this court now undertakes a review of the pending dispositive motions.

The complex facts material to the pending motions have been most ably stated in the parties' briefs and are essentially agreed to. (In addition, these facts are recited in Westinghouse Electric Corp. v. United States, 598 F.2d 759 (3d Cir.1979), in which plaintiff in the instant case joined as a party plaintiff.)

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* The suit was instituted by several corporate entities, who acted in concert in connection with the activities giving rise to this claim. Hence, reference herein is to a singular plantiff.

No purpose would be served by reiterating these facts in detail here; a detailed Statement of Facts is set forth in the Appendix hereto.

The facts central to resolution of this case can be summarized briefly as follows, addressing first the general factual background and second, the facts concerning the "bargaining chip" issue raised extensively by the parties.

Prior to 1954, private corporations were unable to possess, produce, or use nuclear materials. In the years after 1954, the private commercial use of nuclear materials was encouraged, particularly in the generation of electrical power. As part of the cycle of nuclear-generated power, a waste product emerged known as "spent fuel." This spent fuel could be recycled or reprocessed so as to separate radioactive waste as well as plutonium. (Plutonium, unlike the enriched uranium used in the generation of electrical power, also has an application in nuclear weaponry.)

Changes in statutory provisions, such as the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2011-2282, and the Private Ownership of Special Nuclear Materials Act (POSNMA) of 1964, 42 U.S.C. §§ 2012 *et seq.*, reflected these changes and contained the provisions pursuant to which private commercial enterprises could use nuclear fuel. The AEA, for example, provided for the granting of licenses to construct plants for the reprocessing of fuel and, after construction, to operate such plants. The AEA also provided that the issuance of such licenses should take into account whether the issuance "would be inimical to the common defense and security or the health and safety of the public". 42 U.S.C. § 2236.

For the purposes of the pending motions, and based on the facts set forth in detail in the Appendix, it is concluded that, prior to 1977, the government encouraged and exhorted private commercial enterprises to enter the field of nuclear generation of power and of reprocessing of spent nuclear fuel.

Plaintiff obtained a license to construct a reprocessing facility at Barnwell, South Carolina, and began construction in 1971. During the next several years, a number of events occurred, all of which led to the situation giving rise to this suit. In 1974, the government began preparation of a generic environmental statement referred to as GESMO. At about the same time, the government began proceedings on plaintiff's application for an operating license for its Barnwell plant.

Also at about this time, India conducted its first atomic test, using plutonium recovered from a spent-fuel reprocessing plant. In 1976 and 1977, the French and West German nuclear industries were negotiating to sell reprocessing technology to Brazil and Pakistan.

The international concerns about proliferation of nuclear technology, materials, testing, and weaponry had been the subject of non-proliferation treaties in 1968 and 1978. (*See* Appendix, footnote 12.) In 1976, President Ford discussed the risks of plutonium recycling and declared that the country "should pursue reprocessing and recycling in the future only if they are found to be consistent with our international objectives". (*See* Appendix, footnote 7.)

In April 1977, President Carter noted with alarm the serious proliferation risks of plutonium recycling and announced the sponsorship of an International Nuclear Fuel Cycle Evaluation (INFCE) program. The government's immediate response was to defer indefinitely the commercial reprocessing and recycling of plutonium from spent fuel used in the generation of power.

The agency immediately announced a postponement of the GESMO hearings and a reassessment of the applications for licenses relating to recycling. The agency requested comments and received comments on behalf of the President, re-emphasizing his earlier statements. In December 1977, the agency announced the termination of

all GESMO proceedings as well as most proceedings relating to license applications for plutonium recycling. The agency would reexamine the matter after the conclusion of investigations into alternative fuel cycles, which was expected in about two years. (This directive was memorialized in 1978.)

Parties interested in such license proceedings, including plaintiff, filed suit to protest the cessation of proceedings. The agency action was upheld, however, and the court, in *Westinghouse*, 598 F.2d 759, stated that the agency-imposed "moratorium" was appropriate when sound regulatory reasons existed for doing so, as where the moratorium was designed to enable the agency to make rules and regulations which would be applied in the context of processing licensing applications. The court found that the agency did not abuse its discretion or act arbitrarily or capriciously "when it rested its decision in part on a desire not to obstruct the goal of securing international non-proliferation." *Westinghouse*, 598 F.2d at 776.

The court provided that the agency may not completely terminate the license application proceedings, simply by declaring an open-ended moratorium, without passing on the merits of the applications and that the agency must grant licenses unless it makes a finding of inimicality to the common defense and security or to the public health and safety. *Westinghouse*, 598 F.2d at 774.

The court concluded that:

> When and if it ever becomes apparent that the [agency] has de facto denied the license applications despite the applicants' compliance with the pertinent regulations and without making a finding of inimicality, or that the moratorium is of unreasonable duration, judicial recourse will be available to the aggrieved parties.

Id.

The final INFCE hearings were concluded and a report was issued in March 1980. Also at that time a study was issued concerning an interagency Non-proliferation Alternative System Assessment Program (NASAP). Statements on behalf of the President continued, at that time, to recommend that the GESMO proceedings should remain terminated and that a reopening would be inimical to national security and the non-proliferation foreign policy interests of the United States. Then in 1981, President Reagan stated:

> I am lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States. In addition, we will pursue consistent, long-term policies concerning reprocessing of spent fuel from nuclear power reactors and eliminate regulatory impediments to commercial interest in this technology, while ensuring adequate safeguards.

(*See* Appendix, pp. viii and ix.)

Notwithstanding this statement, the agency has not reopened GESMO proceedings or licensing proceedings.

For purposes of the pending motions, and based on the facts set forth in detail in the Appendix, it is concluded that the government's refusal to consider plaintiff's application to operate its Barnwell facility, and the agency's continuation of its indefinite moratorium on such consideration, is based on concerns of international proliferation. It is also concluded that the agency has foresaken domestic commercial reprocessing of spent nuclear fuel as a "bargaining chip" in an effort to further international agreement on non-proliferation.

II. *Issues Presented*

The parties' briefs address the essential elements of a taking claim, namely, whether there is a property interest here which can be the subject of a taking and whether

there has in fact been a taking of that property interest by virtue of the government's actions.[1]

Plaintiff contends that the government's refusal to consider its application for an operating permit constitutes a taking of its license, its plant, or both, requiring just compensation. Plaintiff also contends that even if its property has not been taken for a "public use" by the government, the government regulation and restrictions on the use of the plant constitutes a taking "for a public purpose", and requires just compensation.

With respect to an operating license, defendant contends that the issuance of a license which is subject to certain conditions and administrative considerations, is not a "property right" which can be the subject of a taking, requiring compensation. Moreover, with respect to plaintiff's plant, defendant argues that it has not been taken but remains plaintiff's property, free to be used in any legal manner (absent use as a licensed nuclear reprocessing plant).

Much of the briefing by both parties centered around these issues of regulatory taking.[2]

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[1] One of the other critical elements in determining if a taking has occurred is whether, in fact, the property owner has been deprived of economically viable uses of the property. Evaluation of this factor is based not on a mere diminution of value nor on a denial of the highest and best use of the property, but on the value of the remaining uses to which the property may be put. *See, e.g., Deltona Corp. v. United States*, 228 Ct.Cl. 476, 657 F.2d 1184 (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982).

In the instant case we need not now address that issue. That matter is not properly the subject of the pending motions, and the parties have not stipulated to any values of the property, either before the alleged taking or after. Rather, here, the threshold question is whether there has been, as a matter of law, a taking claim stated based on the facts as set forth in the text above.

[2] In considering the parties' briefs, prior to oral argument, the court noted that the contentions of the parties might be restated so as to embrace other causes of action, some perhaps raising juris-

III. *Opinion*

In 1977, hearings on and consideration of plaintiff's application for an operating license ceased without reaching a decision. Much of what plaintiff complains of in this case centers around that cessation and the actions of the agency and of the Administration generally, including the President and other officials, which led to it. The plaintiff argues that that cessation—and its continuation even to this time—is contrary to the governing statute, the AEA, and constitutes a taking of its property.

However, the 1977 cessation—at least a cessation for some period of time—has been upheld by the court which is statutorily charged with the jurisdiction and responsibility for rendering such determinations, in an action in which both parties here participated. *See Westinghouse, supra*, wherein the court upheld a moratorium designed to enable the agency to promulgate reasonable rules and regulations.

Moreover, the court further stated that, if it became apparent that the agency de facto denied an application without making the required findings of inimicality to public safety or defense or that the moratorium continued for an unreasonable duration, judicial recourse would be available.

A similar situation was presented in *Deltona Corp. v. United States*, 228 Ct.Cl. 476, 485, 657 F.2d 1184 (1981), where the denial of a permit was upheld as valid in a suit under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976) in United States District Court before a claim for taking was presented to the United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491.

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dictional issues. At the outset of oral argument, the court voiced these concerns, which the parties were given an opportunity to address then and in post-argument supplemental briefing.

In *Deltona*, plaintiff did not take issue with this finding in the Court of Claims. In the instant case, plaintiff apparently seeks to contest the finding of the validity of the 1977 cessation of hearings in this court by alleging that the cessation, and the reasons therefor, were improper. Moreover, plaintiff argues that the continued cessation over several years—which the *Westinghouse* decision did not address for the obvious reason that such continuation had not then occurred—is improper.

However, as noted in the text above, and in the accompanying Appendix, Congress, in the governing statute, the AEA, vested in administrative tribunals and in other federal courts, but not in this court, the jurisdiction to review, in the first instance, the validity and propriety of the agency regulatory action. Where such jurisdiction is expressly placed elsewhere, this court cannot, under the guise of hearing a fifth amendment taking claim, assume such jurisdiction to determine the validity of agency regulatory action, or to reverse the findings of validity made by those tribunals statutorily charged with that responsibility. *See also, e.g., Shanbaum v. United States*, 1 Cl.Ct. 177 (1982) *aff'd* 723 F.2d 69 (Fed. Cir. 1983).[3]

This circumstance, in the instant case, is not unlike that in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 185 (1984), where the regulatory taking was alleged to have arisen in connection with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136a and 136h. There, the Court recognized that a taking might occur if the agency were to engage in action which would be unlawful within the statutory framework (such as if it were to release data

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[3] Because Congress, in the AEA, expressly places jurisdiction to review the regulatory action elsewhere than this court, we need not consider other general areas in which a Tucker Act suit would be appropriate. *Cf. South Puerto Rico Sugar Co. Trading Corp. v. United States*, 167 Ct.Cl. 236, 334 F.2d 622 (1964), *cert. denied*, 379 U.S. 964, 85 S.Ct. 654, 13 L.Ed.2d 558 (1964).

submitted between 1972 and 1978 when confidentiality had been statutorily assured). The Court further found that if such a taking did occur, the proper recourse was a suit under the Tucker Act, which could not be repealed by implication in FIFRA. However, the Court also noted that FIFRA put in place an arbitration remedy designed to determine the amount of just compensation, which must be exhausted as a pre-condition to bringing a Tucker Act claim.[4] Until that avenue had been exhausted, no Tucker Act claim could be advanced.

A somewhat similar result was reached in *United States v. Florida Rock Industries*, 791 F.2d 893 (Fed. Cir. 1986), wherein the decision of the lower court was affirmed in part and vacated in part. At issue was a taking claim resulting from regulatory action in which a permit to mine limestone was denied. The denial was based on the agency's finding that there was at least some *de jure* pollution by plaintiff's project. The lower court reviewed this determination and found that no pollution would result, and the Court of Appeals determined that to be error, concluding that:

> . . . [T]he alleged taker had a right, in the Claims Court, to have the claim assessed on the basis that its regulatory action was valid and correct in all respects.

Florida Rock, 791 F.2d at 905.

The court further stated:

> . . . [W]e think it is indisputable that the proper way to challenge the decision to grant or withhold the permit would be under the Administrative Procedures Act (APA), 5 U.S.C. § 702 and ff.

Florida Rock, 791 F.2d at 898.

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[4] The Court also noted that, while such statutory remedies must be exhausted, the action in this court under the Tucker Act would proceed essentially *de novo* in determining the amount of just compensation due plaintiff, without the requirement that either party dispute the correctness of the amount determined by the arbitration.

Similarly, the court noted that an agency refusal to consider applications for permits would be reviewable under the APA and not under the Tucker Act. *Id.* at 899.

Thus, in the instant case, if it is believed that the agency's refusal to recommence consideration of the plaintiff's application for an operating license is invalid or improper, or that such refusal amounts to an invalid de facto denial of the license, the proper place to assert such challenge is through the channels prescribed in the AEA, and not in this court. Pursuit of such redress may presumably lead to two alternative results: the agency's continued moratorium may be upheld or it may be found to have been invalid and an invalid de facto denial of the application; if the agency is required to resume consideration of plaintiff's application, the application may or may not be denied.[5]

This court, lacking the jurisdiction to determine, in the first instance, the validity of the agency regulatory action under the AEA and noting the absence of any finding of invalidity by the appropriate tribunals, assumes, as did the Federal Circuit Court of Appeals in *Florida Rock*, that the election of a Tucker Act suit concedes the authority of the agency to take the regulatory action (including the prolonged moratorium of hearings) now in issue. This assumption is made notwithstanding the vehemence of plaintiff's contentions that the agency action is wholly improper, invalid, and unwarranted,

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[5] If a de facto denial, or a denial after resumed consideration of the application, were to be reversed by the agency, or upon administrative or judicial review of the agency regulatory action, the plaintiff may have been temporarily deprived of the use of its property but, as the Court noted in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, n. 6, 88 L.Ed.2d 419 (1985), it has not yet resolved the question whether compensation is a constitutionally mandated remedy for "temporary regulatory takings". In any event, we do not have such a situation present in this case at this time.

since such contentions are believed to be better addressed to some other tribunal under the AEA. Indeed, in a supplemental brief filed May 29, 1986, plaintiff acknowledges that the validity of the agency's 1977 action has been upheld in *Westinghouse*, and further acknowledges that it will accept that decision without "further APA-review proceedings" so as to proceed directly in this court on a Tucker Act taking claim.

The next issue then presented to this court is whether the presumably correct agency regulatory action constitutes a taking. Under the circumstances here present, this court concludes that it does not.[6]

This court does not in any way refute the now well-established doctrine that government regulation, even if for a valid public interest but without actual public use of the owner's property, can constitute a taking. The Court of Claims restated this doctrine in *Deltona*, where it also found that no taking occurred because plaintiff had not been deprived of economically viable uses of its

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[6] This court also notes that the agency moratorium on hearings in 1977 has been upheld, that plaintiff has not requested, pursuant to the AEA, a resumption of hearings, or the license itself. Thus the claim now presented may well be premature. *See, Riverside Bayview*, 106 S.Ct. at 460.

Plaintiff, of course, contends that the 1977 cessation of the GESMO and related hearings has itself totally and permanently deprived it of its property rights. In any event, we need not encourage needless future litigation of any ripened claim since the court concludes that in no event would plaintiff's property be subject to a taking by proper regulatory action.

Moreover, as noted in footnote 1 above, the parties disagree as to the remaining uses to which the property might be put (as well as any economic valuations). Plaintiff also contends that its application has been effectively denied since there is no longer any possibility of using the facility for its intended purpose. Notwithstanding these controversies, the court believes that, as a matter of law, the regulatory action here cannot constitute a taking requiring just compensation.

lands (a matter not in issue at this time in the instant case). Rather, this court's conclusion is based on an analysis of the differing circumstances present in the instant case from those in which such a taking has been found.

In an early decision in *Eastport Steamship Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002 (1967), the denial of a license by the Maritime Commission was found not to constitute a taking compensable under the Constitution. The court stated as follows:

> The Commission's role was simply part of a pre-existing regulatory process known to the plaintiff from the time it purchased the *Eastport* and the Commission's failure to give its approval within the necessary time took no property from plaintiff any more than a comparable failure by the Federal Trade Commission, the Securities and Exchange Commission, or the Federal Power Commission, in their administrative process, would amount to a taking.

Id. at 612, 372 F.2d at 1011.

The Court of Claims noted particularly that the regulatory process was "pre-existing" and was "known to plaintiff".

On the other hand, the Federal Circuit Court of Appeals in *Florida Rock*, *supra*, opined that the record revealed a strong possibility that a taking occurred, if the proper legal standards were employed in making such determination, while also noting that the regulatory action in issue resulted from amendments of the process which "followed the acquisition [of the statutory property] and, according to the trial judge, *Florida Rock* need not have foreseen them." *Florida Rock*, 791 F.2d at 895.[7]

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[7] In yet another case, a combination of the factors present in both *Eastport* and *Florida Rock* was present.

In *Deltona*, where no taking was found because economically viable uses still remained, the court noted that the property inter-

This focus on foreseeability was upheld at length by the Supreme Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984), where the Court noted the difficulty in determining when a regulatory taking has occurred:

> As has been admitted on numerous occasions, "this Court has generally 'been unable to develop any "set formula" to determine when "justice and fairness" require that "economic injuries caused by public action' " must be deemed a compensable taking [compensated by the government, rather than remaining

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ests were generated pursuant to a limited existing regulatory framework, which framework was then considerably expanded; the court also stated, however, that:

". . . when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from [the agency]. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assurance that the permits would issue, but only an expectation." *Id.* at 491.

This discussion was, of course, directed to plaintiff's assertion that the mere deprivation of its expected highest and best use of its land, holding that such contention does not satisfy the requirements for a taking.

In the instant case, the regulatory framework of the AEA was in place when plaintiff acquired or generated the property interest which it alleges has now been taken. Moreover, like *Eastport*, and unlike *Deltona*, the standards and conditions requisite to obtaining a permit did not change they remained throughout the public health and safety and common defense and security. Plaintiff's contention that administrative concentration on international proliferation and bargaining chips changed the standards anticipated under the existing regulatory framework, is belied by the *Westinghouse* decision upholding these considerations in imposing the 1977 moratorium and, indeed, by the presumption, in this taking case, that the regulatory action was proper. *See* also the discussion in the text above concerning proper tribunals to contest such regulatory regularity.

> disproportionately concentrated on a few persons.] The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. The Court has, however, identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking". Among these factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." [Citations omitted.]

The Court focussed on the criterion of the reasonableness of the investment-backed expectation. *See, also, Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1558 (Fed.Cir.1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

In *Monsanto*, the owner had generated health, safety, and environmental data concerning its pesticide products which it was required to submit to the government in order to obtain a registration to market the products. (*See* FIFRA, *supra.*) The Court held that such data were property rights, the taking of which might require just compensation.

The *Monsanto* opinion addressed the statutory scheme (1) from its inception in 1947, (2) through treatments accorded through 1972, (3) from 1972 to 1978, and (4) the amendments after 1978. The statutory scheme in effect from 1972 to 1978 gave the submitter of the data an opportunity to designate "trade secrets" with the explicit assurance that the agency was prohibited from disclosing publicly (or considering in connection with the application of another applicant), any data which constituted "trade secrets". The Court found that this assurance formed the basis of a reasonable investment-backed expectation in the data. Such reasonable expectations would be frustrated by any agency disclosure not authorized by the statute then in effect (from 1972 to

1978 with respect to data submitted during that period), and a compensable taking might result.

With respect to the amendments effective in 1978, the Court held that:

> . . . Monsanto could not have had a reasonable, investment-backed expectation that [the agency] would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which [the agency] was authorized to use and disclose any data turned over to it by an applicant for registration.
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> * * * *
>
> If, despite the data-consideration and data-disclosure provisions of the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when [the agency] acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Monsanto, 467 U.S. at 1006-07, 104 S.Ct. at 2874-75.

The Court, in *Monsanto, supra*, concluded:

> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

Id. at 1007, 104 S.Ct. at 2875.[8] Thus, the foreseeability

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[8] Monsanto also argued that the statute's very requirement of data submission as a precondition to marketability was a violation of its constitutional rights. The Court, in summarily dismissing this contention, noted that:

"[S]uch restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.' [Citations omitted.] This is particularly true in an area,

of the existing statutory limitations played a key role in the Court's decision.

In sum, in *Eastport*, the Court of Claims found that property interests which were generated pursuant to an existing and foreseeable regulatory framework were not, and could not be, taken by virtue of the operation of that framework. In *Monsanto*, the Supreme Court found that property interests which were generated pursuant to an existing and foreseeable regulatory framework permitting disclosure were not, or could not, be taken by virtue of the operation of that framework or disclosure. Conversely, the Court in *Monsanto* also found that property interests which were generated pursuant to an existing regulatory framework which did not envision disclosure, could be taken by operation of the unforeseeable regulatory action of disclosure.

Plaintiff would apparently concede in this taking case, that the exercise of regulatory action was valid under the AFA. But, at the same time, it argues that the action involved the imposition of standards, such as changes in the state of the art and proliferation of technology, which were not foreseeable under the AEA. These contentions would appear to be inconsistent.

If the agency's action utilizes standards not contemplated within the AEA, then the action should be challenged, elsewhere, as invalid. If the agency's action is valid, and employs standards consonant with the AEA's proscription of public health and welfare and common defense and security, then the standards were foreseeable.

In addition to considering the issues of foreseeability, the identification of regulatory action as a taking involves a "weighing of private and public interests". *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S.Ct.

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such as pesticide sale and use, that has long been the source of public concern and the subject of government regulation." *Id.* at 1007, 104 S.Ct. at 2875.

2138, 2141, 65 L.Ed.2d 106 (1980). With that, as the Court stated in *Monsanto, supra*, one must consider whether the regulatory action is such that the private property owner should bear the burden or whether the public interest and benefit warrant a sharing of that burden by the public fisc. In *Florida Rock, supra*, wherein the court found that, under properly applied legal principles a taking may well have occurred, the court stated:

> This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred. The private interest, unless relieved by a Tucker Act award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return.

Florida Rock, 791 F.2d at 904. (In that case, of course, the matter of determining the exact valuations of the property are to be the subject of remand to the lower court.) But here, again, it must be noted that the lower court found that the changes in the regulatory scheme need not be foreseen by the property owner (and the appellate court apparently accepted such finding).

In the instant case, we have a situation where a plaintiff developed property, at considerable expense, so as to partake of a nuclear fuel industry with the expectation (backed by investments) that it will lead to a most profitable undertaking over many years to come. So also acted the diet-food industry in using, first, cyclamates, then saccharin, and currently aspartame. Both industries generated this property pursuant to existing statutes which provided that continued licensing would be subject to the public interest including, *inter alia*, public safety considerations. As the industries might flourish, considerable returns on the investment might be expected.

Any change in the state of the art or technology, however, such as findings of carcinogenicity of some of the artificial sweeteners, might bring with it recalls of products and financial losses.

On balance, the circumstances present here are such that the plaintiff, albeit at apparently considerable expense, entered into an enterprise which, by virtue of new developments, reaped not the expected financial success but rather considerable loss. Just as the private venture would reap the rewards of success, so must it bear the burden of loss. The regulatory action here, presumed to be valid, cannot be said to have involved considerations so unforseeable that the public, rather than the plaintiff, should bear the burden of the loss.[9]

Based on the standards so far enunciated by the higher courts, and based on the apparent circumstances present in the instant case as compared with those giving rise to such higher court decisions, it is concluded that the property interest generated here cannot be said to be subject to a possible taking.

Nothing in the *Riverside Bayview* decision contradicts the decision reached in this case. Indeed, it appears that the issue was neither raised nor considered in *Riverside*.[10]

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[9] Again, as noted in footnote 5, a different situation of operating licenses were to be found unwarranted, either administratively or through appropriate recourse to the judiciary, and a license subsequently issued. The question of a temporary taking is as yet unresolved. (Any such issue might also occasion the raising of a defense of laches, involving unreasonable delay and possible prejudice to defendant, by virtue of the time elapsed in obtaining the reversal.) As yet, no such reversal has been obtained, nor has plaintiff fully pursued possible AEA review so as to seek such reversal.

[10] Unlike the instant case where constant regulatory jurisdiction and statutory factors have been maintained, it appears that the *Riverside* case involved an expansive change in the agency's regulations interpreting its jurisdiction, rendering it more similar to the *Deltona* case than to *Eastport*, both of which are discussed in the

There has been no case cited to this court in which a property interest, which was acquired and developed subsequent to and subject to a promulgated and existing regulatory scheme, has been found to have been "taken" by the operation and lawful implementation of that regulatory scheme so as to require compensation under the Constitution.

Another significant issue arises in this case. It has been noted that the plaintiff's application for the requisite license has not yet been denied by the agency.

Since the issuance of the INFCE report in 1980, no further proceedings have been commenced by the agency nor have they been requested by plaintiff. Likewise, plaintiff has not sought to use the appeals process contained in the AEA to compel consideration of its application as suggested by the court of appeals in the earlier *Westinghouse* decision.

Thus, the *Riverside* opinion would reinforce this court's decision that a taking claim can lie here, if at all, only after the administrative regulatory process has been enforced, has been concluded, and results in a denial (and a denial subsequently found to be wrongful and/or reversed) of the license plaintiff seeks. (*See, also* footnote 8 above.)

Moreover, in *MacDonald, Sommer & Frates, et al. v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), the Supreme Court commented on incomplete regulatory action, stating:

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

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opinion above. In any event, the issue of foreseeability, and the concomitant question of whether the property interest was generated within the foreseeable regulatory framework, was not addressed in the *Riverside* decision.

MacDonald, 106 S.Ct. at 2567.

The court stated further:

> Most recently, in *Williamson Planning Comm'n. v. Hamilton Bank* [473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126], we held that the developer's failure either to seek variances that would have allowed it to develop the property in accordance with its proposed plat, or to avail itself of an available and facially adequate state procedure by which it might obtain "just compensation," meant that its regulatory taking claim was premature.
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> *Id.*

In the instant case, plaintiff has failed to use the available statutory provisions for review of agency action to ensure agency consideration of its pending application. Plaintiff would argue that this court should "deem" the long delay in resuming agency proceedings as a "constructive denial" of its application and proceed from that denial to determine whether a taking has occurred.

The events leading to the *Eastport* decision, *supra*, would seem to militate against such an approach. The wrongful delay in administrative consideration would be more akin to wrongful action than to providing the basis for a "constructive denial" and hence a taking claim.

We grant that in particular instances an administrative failure to issue a decision is likened to a denial of the claim. (*See, e.g.*, the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(5); even there the appellate tribunal has the discretion to stay proceedings to obtain the absent decision.) In most instances, however, this doctrine is used as a basis for an appeal on the merits of the claim being "deemed" as denied. (As if, for instance, plaintiff sought to appeal a "denial" of its application under the AEA (or APA).)

Absent any existing authority supporting plaintiff's argument, and mindful of the *MacDonald* decision, this

court declines to employ this approach. It will not "deem" the agency to have denied the application on the merits and then determine whether a taking has occurred on the basis of such denial.

Like the Court in *Williamson* and *MacDonald*, this court would not require plaintiff to appeal the merits of any actual denial of its application (or to exhaust all administrative remedies), but it does require that plaintiff receive a final determination from the agency on plaintiff's application—an action which has not yet been taken.

As the Court indicated, in *MacDonald*, the issue of prematurity may be said to go to the jurisdiction of the courts. *MacDonald*, 106 S.Ct. at 2567.[11]

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[11] The courts are charged with the fundamental duty of determining the existence and extent of their jurisdiction. In the instant case, the question of the prematurity of plaintiff's complaint is not the only possibly troublesome jurisdictional issue; more basic issues may exist as well.

This case involves alleged violations of the protections of the Fifth Amendment to the Constitution—namely, protection against a governmental taking without payment of just compensation.

Until the mid-1800's, redress of a violation of the Fifth Amendment was available in two ways: (1) a suit would lie in Article III district courts to prevent, or "undo", any taking not accompanied by just compensation; and (2) a petition could be brought to Congress (*e.g.*, for a private relief bill) to obtain the just compensation due. With the enactment of the Tucker Act (28 U.S.C. § 1491(a)(1)), sovereign immunity was waived and a suit could be brought for the monetary amount of just compensation.

For many years, discussion ensued as to the type of forum upon which such jurisdiction, for money damages, could properly be conferred. The Supreme Court, in *Glidden v. Zdanok*, 370 U.S. 530, at 543, 549, 82 S.Ct. 1459, 1469-72, 8 L.Ed.2d 671 (and footnote 21), noted suggestions that such jurisdiction must rest in judicial (Article III) courts rather than legislative (Article I) courts. In that decision, the Court also determined that the Court of Claims, then the repository of the Tucker Act jurisdiction over taking claims, was an Article III court. (*See, also* general discussions in

CONCLUSION

Based on the foregoing, it is concluded that the plaintiff's claim is premature and that therefore this court lacks jurisdiction thereof.

Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) and *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 785 (1982)).

The Federal Courts Improvement Act of 1982 (Pub. L. 97-164), or FCIA, amended the Tucker Act (28 U.S.C. § 1491(a)(1)) so as to confer jurisdiction for award of money damages for such taking claims in this court. The FCIA also provided that the Claims Court was established under Article I, and its judges serve limited fixed terms. As a waiver of sovereign immunity against suit for money damages, such conferral of jurisdiction is not objectionable. However, given its broader implications, the conferral of jurisdiction may be questionable.

The FCIA did not confer any concurrent jurisdiction in the Article III district courts for the award of money damages. *See, e.g.*, 28 U.S.C. § 1346(a)(1) with respect concurrent Tucker Act jurisdiction over tax-refund cases. (While the decisions of the Claims Court are subject to appeal in the Article III Court of Appeals for the Federal Circuit, the lower court's findings of fact are, under current practice, presumed correct unless shown to be clearly erroneous.) Thus, there is no *de novo* consideration by an Article III court of suits for just compensation.

Moreover, given the provisions of the current Tucker Act, the district courts may not be permitted to prevent or "undo" takings not accompanied by adequate just compensation. *See, e.g., Riverside Bayview*, 106 S.Ct. at 460 (and footnote 6). Rather, the exclusive avenue of relief may be under the Tucker Act and hence in this court.

In any event, with respect to "regulatory takings" involving statutes designed to protect the public safety and welfare, it may be more desirable to provide for a monetary remedy to the claimant than to attempt to prevent or "undo" execution of the regulatory action. (*See, e.g.*, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136m; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) and footnote 4 above.)

Thus, with the FCIA's amendment of the Tucker Act, and its creation of the Claims Court, an Article I court may now, appar-

Accordingly, the defendant's motion for summary judgment is GRANTED, and the petition is to be dismissed without prejudice.[12]

Alternatively, in the event that it were to be found that the claim were not premature and/or that this court did have jurisdiction, then, based on the foregoing, it is concluded that plaintiff's complaint does not set forth a claim for compensable taking for which this court can grant relief inasmuch as the property allegedly taken was generated under the existing regulatory system. (In this event, the defendant's motion would likewise be

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ently, be the sole arbiter (particularly in the resolution of factual issues) of citizens' rights under the Constitution's Fifth Amendment.

Mindful of our responsibility to determine jurisdiction, but also mindful of the axiom that constitutional challenges to statutes (such as the FCIA which unquestionably confers jurisdiction here) are to be avoided unless absolutely necessary, and as a last resort, this court takes an unusual, but not unprecedented, step. Having determined to dismiss the case on other grounds, this court will not address further the basic issues of jurisdiction outlined in this footnote. *See, e.g., Travis v. United States*, 199 Ct. Cl. 67, at 70 (footnote 1) (1972).

[12] During oral arguments, the court suggested that plaintiff may desire to suspend further proceedings here, seek further agency determination on its application, and then supplement its petition to include any new results. (The court indicated that it would nonetheless certify its interlocutory decision for appeal purposes.)

In this way, both its original cause of action and any claim based on the more recent action would remain before the court—eliminating any possible statute of limitations defenses which might possibly otherwise arise. (While the court could not predict that any such defenses would exist, discourses in some professional journals suggest that the issue is not without controversy.)

Plaintiff, however, requested that the court not take this action but, if dismissal is indicated, the case be dismissed outright. This would eliminate any discretion in an appeal from this court's decision. Accordingly, in dismissing this action the court accedes to plaintiff's request.

granted, but the complaint would be dismissed with prejudice. *See, e.g.*, RUSCC 41(b) with regard to motions to dismiss for failure to state a claim based on evidence, or facts, as presented by plaintiff only.)

Costs to the prevailing party.

APPENDIX

A. *Statement of Facts*

The first statutory enactment cited by the parties, treating the possession or use of nuclear technology or materials by private entities, is the Atomic Energy Act of 1946.[1] Before that time, presumably, there was no statutory regulation and with the passage of that Act such possession or use was severely limited or proscribed.

Shortly thereafter, the Atomic Energy Act of 1954 (the "AEA") was enacted and it is with that statute that this case is now concerned.[2] The AEA altered the policy of the previous statute, and permitted private possession and use of nuclear technology and materials subject to certain regulatory schemes, including the requirement for licensing. (See also the subsequent Private Ownership of Special Nuclear Materials Act of 1964 ("POSNMA").[3]) Also relevant is the National Environmental Policy Act of 1970 ("NEPA").[4]

As provided in the AEA (and the subsequent POSNMA), and to the extent consistent with the NEPA, nuclear materials could be possessed by private entities. Indeed, under the AEA, related government agencies (now the NRC) encouraged the private commercial use of nuclear processes in the generation of electrical power sources and this policy was pursued during the course of at least the next two decades.[5]

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[1] Atomic Energy Act of 1946, 60 Stat. 755 (superseded in 1954).

[2] Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. §§ 2011-2282 (1976 and Supp. V. 1981).

[3] Private Ownership of Special Nuclear Materials Act of 1964, 78 Stat. 602, codified at 42 U.S.C. § 2012 *et seq.*

[4] The National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (eff. Jan. 1, 1970) 42 U.S.C. § 4321, *et seq.*

[5] Passing reference is also made by the parties to another statute, one enacted after the events here in issue, namely the Nuclear Waste

An understanding of the facts material to the instant motions requires a slight digression into the field of nuclear-generated electric power and the nuclear fuel cycle.

The nuclear reactors used by electric utilities primarily use enriched uranium dioxide as fuel, and, during the nuclear chain reaction some of this uranium is transmuted into plutonium. When no longer of use to the utility, the fuel is defined as "spent" and is removed from the reactor; the spent fuel contains uranium, plutonium, and waste.

Disposal of this spent fuel may present problems including those incident to the storage of radioactive elements. Accordingly, private commercial enterprises might be further encouraged to use nuclear processes for generating power if the disposal of spent fuel were assumed by the government.

Reprocessing (or "recycling") the spent nuclear fuel, a process sometimes referred to as the "back end" of the fuel treatment, is an alternative to disposal.

Recycling of spent fuel could result in fabrication of new mixed oxide nuclear fuel (by separating the uranium, the plutonium, and the waste) which could in turn constitute a significant new source of energy and conserve the world's uranium supply. One difficulty with such reprocessing, however, is that it results in separation of plutonium from the spent fuel. Plutonium, unlike the enriched uranium, has application not only for nuclear electric power but also nuclear weaponry.

As noted above, the AEA of 1954 and POSNMA of 1964, enabled private concerns to possess and use nuclear fuel in generating power. Possession for the purpose of recycling was also permitted. The government began encouraging research and development in this field in the

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Policy Act of 1982, Pub. L. 97-425, 96 Stat. 2202 (eff. Jan. 7, 1983), 42 U.S.C. § 10101 *et seq.* ("NWPA").

late 1950's and continued this activity through the mid-1970's.[6]

The AEA required that a construction permit be obtained before building began to assure compliance with various procedures not here in issue. After completion of construction, a further license was required permitting operation of the plant and actual fuel reprocessing.

The AEA provided, at 42 U.S.C. § 2133(d), 2134(d), that the government was precluded from issuing a license if such issuance "would be inimical to the common defense and security or the health and safety of the public." A license once granted could be revoked for the same reasons. 42 U.S.C. § 2236(a).

Applications for permits and licenses are made to the Atomic Safety and Licensing Board. (In connection with operating licenses, hearings are held only in contested cases and with respect to matters in controversy.) The decision of the Board is appealable to an Atomic Safety and Licensing Appeal Board, and thereafter is subject to discretionary review by the agency itself. Final orders are directly appealable to the courts of appeals. 42 U.S.C. § 2239(b); 28 U.S.C. § 2343; 10 C.F.R. §§ 2.714, 2.721, 2.786, 2.787.

Plaintiff purchased land at Barnwell, South Carolina, with the intention of constructing a reprocessing plant and applied for a construction permit in 1968. Plaintiff retains title to and use of the land herein involved. In December 1970, when the AEA and NEPA were in effect, plaintiff was granted a construction permit. It began constructing a building facility for the purpose of reprocessing spent nuclear fuel in 1971. The building was completed and plaintiff applied for the operating

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[6] *Westinghouse Electric Corp. v. United States*, 598 F.2d 759, 762 n.4 (3d Cir. 1979) (a reprocessing plant was built by Nuclear Fuel Services, Inc. in 1960 and operated by it from 1966 to 1971).

permit. (In the construction phase, plaintiff incurred a multi-million dollar expense.)

It was in connection with this licensing (for operation) procedure that the controversy arose giving rise to this suit.

Plaintiff contends that the government, notwithstanding and in spite of its early encouragement of the entry of private concerns into the nuclear fuel process and reprocessing, wrongfully abandoned its licensing consideration in 1977 thereby resulting in a taking of plaintiff's property. The focus of the complaint is the government's action (or lack thereof) in 1977 and the processes leading up to it.

The government recognized that the NEPA required the preparation of an environmental impact statement (EIS) concerning any decision to implement a wide-scale program for commercial recycling of spent fuel containing plutonium. In 1974, the government began preparation of such a statement, a Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors, referred to as "GESMO".

Concomitant with the GESMO proceedings, the government conducted adjudicatory licensing proceedings on applications by private companies dealing with the construction and operation of recycling plants, including the application for operation of the nearly-completed plant submitted by AGNS.

The agency's first draft of GESMO, in mid-1974, prompted a response from the President's Council on Environmental Quality, noting the failure of the draft to address such concerns as the danger of proliferation and possible safeguards.[7] The agency then promulgated,

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[7] In October 1976, President Ford discussed the risks entailed in plutonium recycling and declared that the nation "should pursue

in November 1975, a policy stating that proliferation risks and safeguards would be included in GESMO, and promulgated procedures for hearings.

The 1975 statement also provided that the agency would consider interim licensing of non-experimental, recycle-related activities. Various environmental groups challenged this procedure and the Court of Appeals for the Second Circuit, in 1976, affirmed the agency's hearing procedures but held that the interim licensing of recycle-related activities on a commercial basis violated NEPA. In view of agency statements in 1977, the Supreme Court vacated and remanded the matter for consideration of mootness. *National Resources Defense Council (NRDC) v. United States Nuclear Regulatory Commission (NRC)*, 539 F.2d 824 (2d Cir. 1976), vacated and remanded *sub nom. Allied General Nuclear Services v. NRDC*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

In April 1977, President Carter disclosed his Administration's policy, noting with alarm the serious proliferation risks of plutonium recycling. The government's response would be to defer indefinitely the commercial reprocessing and recycling of plutonium produced in United States nuclear power programs. The President also announced sponsorship of an International Nuclear Fuel Cycle Evaluation (INFCE) program aimed at developing alternative processes.

Almost immediately, the agency postponed further GESMO hearings and, on May 3, 1977, announced its intention to reassess "the future course and scope of GESMO, the review of recycle-related applications, and the matter of interim licensing." Comments were in-

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reprocessing and recycling in the future only if they are found to be consistent with our international objectives." Statement by the President on Nuclear Power Policy, reprinted in 12 Weekly Comp. of Pres. Doc. 1624, 1626 (1976), as quoted by the court in *Westinghouse*, 598 F.2d at 763.

vited and, on October 4, 1977, a letter submitted on behalf of the President re-emphasized the President's previous comments of April. This letter also suggested accelerated research and development to examine alternative fuel cycles which would not involve direct access to plutonium.

Thereafter, in December 1977, the agency issued an order terminating the GESMO proceedings as well as most proceedings relating to plutonium-recycle license applications. The order also committed the agency to a reexamination of the matter after the completion of the ongoing alternative fuel cycle studies, expected to take about two years. This order was memorialized in a Memorandum of Decision issued on May 8, 1978.

In a series of legal actions, culminating in *Westinghouse*, plaintiff and other interested parties challenged, *inter alia*, the cessation of GESMO and licensing proceedings. At issue was plaintiff's plant, located in Barnwell, South Carolina, for which it had sought an operating license.

In its 1979 decision in *Westinghouse*, 598 F.2d at 770, the Court of Appeals for the Third Circuit described the agency action as follows:

> Essentially, then, the NRC has imposed a moratorium, expected to last about two years, upon its decisionmaking process regarding plutonium recycling, and, as a result, has terminated the pending GESMO and related licensing proceedings.

The court held that the agency did have the authority to impose such a moratorium, stating:

> . . . [A]n agency that is invested with such extensive powers to effectuate its far-reaching mandate may impose a moratorium upon its decisionmaking process when sound regulatory reasons exist for doing so . . . .

Id. at 772. Such moratoria may be put in place without a prior finding by the agency that the granting of a license would be inimical to the common defense and security or to the health and safety of the public, particularly where a moratorium is itself designed to enable the agency to make reasoned decisions regarding rules and regulations which should be applied in the context of processing license applications. *Id.* at 772.

The court recognized that the administrative body involved in these deliberations was an independent one, and found that the agency preserved that independence, even while considering comments of many interested parties, including the President. As the court stated:

> . . . the [agency] is directed in many provisions of the AEA to consider "the common defense and security." Any contemplation of these sensitive matters necessarily touches upon areas that are also within the domain of the President and of Congress. [Footnote omitted]. It was therefore appropriate for the [agency] to take note of the relevant developments in the executive and legislative branches and to ascertain, with the help of interested parties, what bearing these developments may have on its own agenda. As we understand the [agency's] actions here, that is all it did, and it maintained its independence from both those branches while making an informed decision to suspend its proceedings. . . . Given this record, we cannot say that the [agency] abused its discretion or acted arbitrarily, capriciously, or not in accordance with the law when it rested its decision in part on a desire not to obstruct the goal of securing international nonproliferation.

Id. at 775-76.

The agency published the substance of this exchange and requested public comment on whether the GESMO proceedings should be reopened. 45 *Fed.Reg.* 53933 (August 13, 1980).

While upholding the agency's moratorium, the court also set forth the following important statement:

> Of course, the [agency] may not completely terminate license applications proceedings without passing on the merits of the applications, simply by declaring an open-ended moratorium. It is required by statute to fix the conditions and regulations pursuant to which licenses will be granted, and to award such licenses if the prerequisites are met, unless it makes a finding of inimicality to the common defense and security or to the public health and safety. [Footnote omitted].

Id. at 774.

The court concluded as follows:

> When and if it ever becomes apparent that the [agency] has *de facto* denied the license applications despite the applicants' compliance with the pertinent regulations and without making a finding of inimicality, or that the moratorium is of unreasonable duration, judicial recourse will be available to the aggrieved parties.

Id. at 774.

The final nine-volume report of the INFCE Hearings was issued in March 1980. *See* International Atomic Energy Agency *INFCE Summary Volume*, 137-56 (1980). At about the same time, a study was issued concerning an interagency Non-proliferation Alternative System Assessment Program (NASAP).

In May 1980, the agency wrote to a representative of the President noting its commitment to re-examine the applications and resume GESMO proceedings. In July 1980, that representative, Mr. Stuart Eizenstat, advised the agency that the views expressed by the Administra-

tion in 1977 were still applicable; that the President believed that the GESMO proceedings should remain terminated; and that a reopening of GESMO would be inimical to national security and contrary to the non-proliferation and foreign policy interests of the United States.

Some comments were received, but plaintiff only requested an extension of time. This request was denied but the agency stated that it would consider untimely comments to the extent possible. At the time, plaintiff was engaged in discussions with the government concerning the latter's purchase of the Barnwell plant, as discussed below.

From 1977 to 1983, the government, through the Department of Energy, *inter alia*, undertook significant research and development work at plaintiff's Barnwell facility, expending some $100 million during that six-year period. (Notwithstanding that expenditure, AGNS' Barnwell facility was not operated commercially and earned no profit.)

During this period, consideration was also given to using Barnwell as a storage facility, away from reactors, for utilities' spent fuel. Representatives of AGNS and the government also discussed sale of the facility to the government for this purpose in 1980 and 1981.[8]

In 1981, the new Administration believed it would be inappropriate to purchase the Barnwell facility, and suggested consultation with industry on how to create a

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[8] In connection with setting a value on the facility for purposes of purchase, at least one government official recommended that an appraisal be based on highest and best use as a reprocessing facility; he also recommended that an appraisal on the cost approach be undertaken, noting the plaintiff's arguments that, but for the government's interference, the facility would have been completed and operated as a reprocessing plant. The official's comments noted also the contention that the Federal Government induced plaintiff to incur the expenses of millions of dollars and then, by excess regulation, destroyed any chance of success of the facility.

more favorable climate for reprocessing by private commercial interests.

In October 1981, President Reagan announced:

> I am lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States. In addition, we will pursue consistent, long-term policies concerning reprocessing of spent fuel from nuclear power reactors and eliminate regulatory impediments to commercial interest in this technology, while ensuring adequate safeguards.

See Statement Announcing a Series of Policy Initiatives on Nuclear Energy, 1981 Pub. Papers 903 (Pltf. App. Vol. 1, Tab 99). Notwithstanding this statement, however, the agency has not reopened GESMO or licensing proceedings.[9]

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[9] Moreover, there has, for example, been no administrative implementation of the provisions of the NWPA of 1982, 42 U.S.C. §§ 10101(12) *et seq.*, authorizing the government to accept reprocessed waste in such a way as to encourage reprocessing.

The Department of Energy has declined to establish a system of crediting utilities for reprocessing of their spent fuel. (Pltf. App., Vol. I, Tabs 100, 101.) The Administration has also rejected a 1983 proposal by Bechtel Corporation to utilize the Barnwell facility in a joint venture with the government as a commercial reprocessing demonstration and has agreed to terminate all government research and development projects at that facility. (Pltf. App., Vol. 1, Tabs 102, 103.)

The government, for the purposes of the instant motions, recognizes the Barnwell facility as capable, on its own, of operating to recycle fuel if granted a license. It points out, however, that in fact, the plaintiff's plant was just one element of a complete fuel cycle industry, all parts of which would have required further licensing by the agency. Casks for the transportation of spent fuel would need to have been built; plants to fabricate mixed oxide fuel would have to be built and licensed; and operating reactors would have required license amendments to load and use mixed oxide fuel.

The government also notes the regulations of the agency promulgated in 1970 that required that radioactive liquid wastes be solidified within five years of their generation and transferred to a fed-

A Department of Energy report in March 1983 characterized the Barnwell facility as capable of commercial operation and reprocessing as a proven technology. (Pltf. App., Vol. I, Tab 82, pp. 8, 41, 42).[10]

Given the agency failure to reopen GESMO and licensing application procedures (although plaintiff has not formally requested such reopening or pursued administrative avenues to challenge any refusal to reopen, by explicit decision or implicitly by delay, and to require such reopening), plaintiff filed suit here in March 1983.

B. *Facts about Government Inducement and International "Bargaining Chips"*

In particular factual areas, the parties are not in agreement, but have stipulated the facts for the purposes of the pending motions and for such purposes only. These particular areas involve (1) Government Inducement and (2) International "Bargaining Chips".

1. *Government Inducement*

At the outset of the factual recitation above, it was stated that, beginning with the AEA in 1954, private commercial use of nuclear process was "encouraged". The court in *Westinghouse*, 598 F.2d at 762, n.4, noted that

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eral waste repository within ten years. This would require plaintiff to complete and secure a license for a waste solidification facility within five years from the time Barnwell began to operate. No federal waste repository for such solid fuel currently exists. However, the NWPA of 1982 establishes a multi-step program for the development of geologic repositories for the disposal of high-level radioactive wastes and spent nuclear fuel, with such facilities probably in operation not before the late 1990's. (*See also* note 5, *supra.*)

[10] Other private associations, such as the International Energy Associates, Ltd., also lauded the Barnwell facility as technologically sound. (*See* Pltf. App., Vol. I, Tabs 104, 105.)

"the government began encouraging research and development in this field in 1957 . . . ."

The plaintiff alleges, and defendant, for the purposes of the pending motions, agrees that the government's encouragement may be characterized as vigorous and, indeed, amounted to "inducement". As stated by plaintiff:

> Without the assurances, land, and technology provided by the Government, AGNS would not have entered the spent fuel reprocessing industry and would not have invested hundreds of millions of dollars to build [its plant]. By 1977, having been coaxed for over twenty years by deliberate and continuing Government inducements and assurances, AGNS had nearly completed the construction of [its plant]. [Plaintiff's brief, at pages 2-3.]

Plaintiff further states, in this connection:

> Beginning with the Atomic Energy Act of 1954 and continuing through 1976, the Government induced private industry to assume an obligation which the Government had guaranteed the electric power utilities it would perform—the maintenance of the back end of the nuclear energy [spent] fuel cycle. [Footnotes omitted]. [Pltf. Br., pp. 6-7.]
>
> The underlying motive for the Government's numerous inducements was the mandate of the [Act of 1954] that private enterprise take the leading role in the nuclear industry. As stated in a Senate Report discussing the Act, "[T]he goal of atomic power at competitive prices will be reached more quickly if private enterprise, using private funds, is now encouraged to play a far larger role in the development of atomic power than is permitted under existing legislation". [Footnote omitted]. [Pltf. Br., p. 8.]
>
> In January 1956 the [agency] announced its goal that private industry build plants to reprocess spent

> nuclear fuel and stated that proposals would be invited for the design, construction and operation of such plants. The [agency] would provide successful applicants access to its laboratories and supply them with initial baseloads of spent fuel. [Footnotes omitted.] [Pltf. Br., p. 9.]
>
> * * * *
>
> To importune public utilities to invest in nuclear power to generate electricity, the [agency] guaranteed the back end of the [spent] fuel cycle. In other words it guaranteed utilities that spent reactor fuel would be the responsibility of the [agency]. . . . To relieve itself of this duty, the [agency] continued its program to induce private industry to invest in reprocessing, hoping to create a private sector to handle the spent fuel. [Footnotes omitted]. [Pltf. Br., pp. 9-10].

As plaintiff notes, the industry remained somewhat hesitant and, in April 1957, the agency, at its own invitation, met with plaintiff and other companies. In October 1957, R.W. Cook, the agency's Acting General Manager stated that the agency still expected private industry to reprocess by June 30, 1967.

In addition to the inducements of providing access to government laboratories and guaranteeing baseload quantities of fuel, as described above, further government inducement and assistance is described by plaintiff as follows:

> Noting that the use of Government plants to perform reprocessing services over the long term would be undesirable, Cook concluded that "[T]he way is open at any time for industry to build and operate a purely commercial reprocessing facility subject only to the [agency's] licensing requirements." [Footnote omitted].

> In furtherance of the mandate of [the AEA], the [agency] established its Office of Industrial Participation in May 1961. [Pltf. Br., pp. 10-11.]

Plaintiff also cites many public statements by agency officials and members of Congress supporting and encouraging the entry of private enterprise into the reprocessing field.

After noting a number of government requests and contracts with the government in related projects, plaintiff notes that it or, more specifically, one of the members of the joint venture, announced its intention of entering the spent fuel reprocessing industry in 1965, in reasonable reliance upon the government's inducements. The government assisted in the formation of the plaintiff entity by suggesting potential partners.

Moreover, plaintiff notes the government's inducements specifically directed to AGNS as follows:

> [A predecessor venture was] awarded a five-year contract to manage the Idaho Nuclear Plant. The contract was intended by the [agency] to give Allied reprocessing experience in return for Allied's assurance that it would proceed with plans to construct its own plant. [Footnotes omitted]. [Pltf. Br., p. 16.] The Government likewise acted to provide land on which [AGNS] could construct a reprocessing plant. In March 1967 [agency] Chairman Seaborg wrote to South Carolina Governor McNair, stating that the [agency] could make land available from the Government's Savannah River Plant (SRP) for a proposed privately owned reprocessing plant. [Footnote omitted]. Arrangements were made in March 1968 among the General Services Administration, the State of South Carolina, and the County of Barnwell for the Government to transfer a portion of the SRP property to Barnwell County, which in turn was to convey the site to [AGNS] for the express

purpose of constructing [its reprocessing plant] BNFP. [Pltf. Br., pp. 18-19.]

As plaintiff points out, statements of agency officials continued to encourage, and indeed look forward to, entry of private industry into the spent fuel reprocessing field. Officials communicated this desire to AGNS directly, as well. In April 1975, the Energy Research and Development Administration (ERDA) contracted with AGNS to lend AGNS uranium oxide which was to be used in the start-up of plaintiff's plant and then returned to the government (in reprocessed form).

In sum, the government did encourage the entry of private industry, and AGNS in particular, into this field. The degree of encouragement was indeed vigorous and continual.

As defendant notes, however, the industry, and the predecessor companies combining to form the plaintiff AGNS, were highly competent and fully versed, and entered into this endeavor of their own free will as a business venture.

2. *International Bargaining Chips* [11]

As suggested in the text above, the agency decision to suspend the GESMO hearings was the result of information it had received from the Administration concerning the dangers of international proliferation.[12] Also tran-

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[11] In connection with this matter, if the case is not resolved on the dispositive motions, for which purpose defendant has agreed to the facts as alleged by plaintiff, the facts are not only controverted but, for their resolution, extensive discovery has been outlined by plaintiff, much of which is objected to by defendant as involving executive privilege, sensitive foreign policy matters, and on many other grounds.

[12] Such concerns were recognized in the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, as well as the Nuclear Non-Proliferation Act of 1978, Pub. L. 95-242, codified at 22 U.S.C. §§ 3201 *et seq.*

spiring were India's atomic test in 1974, using plutonium recovered from an Indian reprocessing plant, and in 1976 and 1977 the French and West German nuclear industries were negotiating to sell reprocessing technology to Brazil and Pakistan.

Concern over proliferation was echoed in an agency announcement in May 1978, as follows:

> . . . [I]f the United States were to deny other nations the right to reprocess while continuing to pursue commercial reprocessing at home, it would undermine the credibility of our concern about the use of plutonium and our international initiatives towards non-proliferation.

43 *Fed.Reg.* 20575, May 1978.

At the time, the private commercial nuclear reprocessing was represented principally by plaintiff's Barnwell plant which was being constructed and was eligible for issuance of an operating permit. However, the government, at that time and to date, has operated a reprocessing plant known as the Savannah River Plant in the same area where plaintiff's Barnwell plant was located.

The advice and information furnished by President Carter in 1977 and thereafter, and the agency's response thereto, have been summarized above.

The plaintiff, in its brief at page 34, characterizes these events as follows:

> . . . the Government had sacrificed domestic commercial reprocessing, namely [plaintiff's plant], solely as a bargaining chip for international diplomacy and without any domestic health and safety rationale.

For the purposes of the pending motions, the parties would agree that domestic commercial reprocessing, particularly as it affected operation of plaintiff's plant for

which application was pending, was a "bargaining chip" in international negotiations.

Apart from the bargaining chip considerations of nuclear proliferation, no findings have been issued to date, either administratively or in the courts, concerning any ways in which the operation of plaintiff's plant would be inimical to the public health and safety or to the common defense and security.

However, it is also unquestioned that the court in *Westinghouse* found that, as part of the administrative process, it was appropriate, in the interests of common defense and security, for the agency to take note of relevant developments in the executive and legislative branches concerning proliferation and that the agency had not abused its discretion in determining to suspend consideration of plaintiff's application for this purpose.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 2133 (1982)

§ 2133. Commercial licenses

(a) Conditions

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

(b) Nonexclusive basis

The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or

source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such license as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

(c) License period

Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.

(d) Limitations

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. No license may be issued to an alien or any any[1] corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

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[1] So in original.

(f) [2] Accident notification condition; license revocation; license amendment to include condition

Each license issued for a utilization facility under this section or section 2134(b) of this title shall require as a condition thereof that in case of any accident which could result in an unplanned release of quantities of fission products in excess of allowable limits for normal operation established by the Commission, the licensee shall immediately so notify the Commission. Violation of the condition prescribed by this subsection may, in the Commission's discretion, constitute grounds for license revocation. In accordance with section 2237 of this title, the Commission shall promptly amend each license for a utilization facility issued under this section or section 2134(b) of this title which is in effect on June 30, 1980, to include the provisions required under this subsection.

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[2] So in original. Section enacted without a subsec. (e).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1474

NL INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court in CASE NO(S). 229-83C

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Feb. 24, 1988

Issued as a Mandate: March 25, 1988

Costs, Against; Appellant

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Supreme Court, U.S.
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(2)

No. 87-1922

In the Supreme Court of the United States

OCTOBER TERM, 1988

NL INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's property, which was designed to transport nuclear fuel to and from a nuclear fuel reprocessing plant, was taken without just compensation when the Nuclear Regulatory Commission (Commission) did not grant an operating license for the reprocessing plant in the late 1970s.

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No. 87-1922

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 839 F.2d 1578. The opinion of the United States Claims Court (Pet. App. 16a-45a) is reported at 12 Cl. Ct. 391.

JURISDICTION

The judgment of the court of appeals (Pet. App. 91a) was entered on February 24, 1988. The petition for a writ of certiorari was filed on May 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, Allied General Nuclear Services (AGNS) began constructing a nuclear fuel reprocessing plant in Barnwell, South Carolina. AGNS hoped to take expended nuclear fuel from nuclear power plants and produce en-

riched uranium oxide that could be reintroduced into nuclear reactors. Petitioner contracted with AGNS to transport nuclear fuel to and from the Barnwell reprocessing plant. Nuclear material must be transported in shielded containers to prevent the escape of radiation. By 1977, petitioner had invested $15.5 million in the design and construction of transportation systems for the Barnwell plant. The Commission[1] granted petitioner the necessary licenses to operate its transportation systems. Pet. App. 19a-20a.

Under the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.* (AEA), AGNS may not operate the Barnwell plant until it receives an operating license from the Commission. Throughout the 1970s, as the plant was being built, the Commission and others were concerned that nuclear fuel reprocessing plants might lead to the spread of nuclear weapons.[2] In 1977, at the request of President Carter, the Commission suspended licensing proceedings until two studies on nuclear fuel cycles could be completed (Pet. App. 21a). The Third Circuit upheld this action in *Westinghouse Elec. Corp.* v. *NRC*, 598 F.2d 759 (1979).[3] In 1980, after the two studies were published,

[1] The Atomic Energy Commission originally regulated the nuclear power industry. In 1975, it was succeeded in that function by the Nuclear Regulatory Commission. See 42 U.S.C. 5814(a), 5841(f). We use the word "Commission" to refer to either the Atomic Energy Commission or the Nuclear Regulatory Commission.

[2] When expended nuclear fuel is reprocessed, plutonium is separated from the radioactive waste. We fully explain the recycling process and the history of the licensing proceedings regarding the Barnwell plant in our brief in opposition in *Allied-General Nuclear Services* v. *United States*, No. 87-1902. We are serving petitioner a copy of our brief in that case.

[3] The Third Circuit based its decision on the ground that, under the AEA, the Commission may not issue an operating license if that license "would be inimical to the common defense and security or to the health and safety of the public" (42 U.S.C. 2133(d), 2134(d)).

the Commission sought public comments on whether it should reopen the licensing proceedings. Neither petitioner nor AGNS responded (Pet. App. 79a). And despite President Reagan's endorsement of commercial reprocessing in 1981, AGNS has not pursued its application for an operating license for the Barnwell plant (*id.* at 81a). Petitioner asserts that "the regulatory environment ha[s] changed so significantly that reprocessing [is] no longer viable" (Pet. 7).

2. Petitioner filed in the United States Claims Court this action alleging that the government has taken petitioner's property without just compensation (Pet. App. 22a). Petitioner alleges that its contract with AGNS and its nuclear fuel transport systems were rendered worthless by the Commission's decision to suspend licensing proceedings on the Barnwell plant in 1977 (*ibid.*).

The Claims Court granted the government's motion to dismiss petitioner's takings claim (Pet. App. 45a).[4] The court's decison rested in large part on its opinion in a companion case brought by AGNS (*id.* at 46a-87a). The court observed that petitioner was on notice that AGNS needed to obtain an operating license for the Barnwell plant from the Commission (*id.* at 29a). And the court held that the Commission acted in accordance with the AEA when it did not issue such a license in the late 1970s (*id.* at 23a). The court reasoned, therefore, that petitioner's property was not taken by government regulation because the "property was acquired, generated, and developed, well-within a preexisting regulatory scheme which subjected property to the possibility of the imposition of the limita-

[4] The Claims Court did not address petitioner's additional claim that the government breached an implied contract with petitioner. The court, however, certified its judgment for an immediate appeal.

tions now complained of" (*id.* at 33a). The Claims Court concluded: "private entrepreneurs were solely responsible for their ultimate decision to participate in this market; they alone would benefit financially from success and they alone must bear the monetary losses from their investment" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-2a). The court relied on its opinion in the companion case brought by AGNS. The court stated that petitioner's "claim is subject to the same infirmities as that of [AGNS], plus the added one that the act constituting the alleged taking had as its target [AGNS], not [petitioner], so [petitioner] is separated from it by an additional step" (*id.* at 2a). The court of appeals held that petitioner's claim, at bottom, is one for "frustration of a business by loss of a customer," which is "not a taking" (*ibid.*).

ARGUMENT

1. In our brief in opposition in *Allied-General Nuclear Services* v. *United States*, No. 87-1902, we explain that the Commission's actions did not constitute a taking of the Barnwell reprocessing plant. The Commission did not occupy, use, or in any manner take possession of the Barnwell plant. Rather, the Commission, following its mandate under the AEA, declined to issue AGNS an operating permit as the plant neared completion. But, as we explain in detail in our brief in *Allied-General Nuclear Services*, AGNS "willingly accepted that risk" when it constructed the plant. *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 410 (1961).

Petitioner's takings claim is likewise without merit. When petitioner entered into a contract with AGNS to transport nuclear fuel to and from the Barnwell plant,

petitioner was aware that AGNS could not operate the plant without a license from the Commission. Thus, petitioner built the transportation systems while it was fully "aware of the conditions under which" AGNS could perform the contract. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984). One of those conditions—the issuance of an operating license—was not fulfilled and petitioner claims that it lost its investment. But the government never promised either petitioner or AGNS that the Commission would issue AGNS an operating license. Accordingly, petitioner "could not have had a reasonable, investment-backed expectation that" the Commission would permit the Barnwell plant to operate soon enough or long enough so that petitioner could make a profit on its investment (*id.* at 1006).

Indeed, as the Claims Court noted (Pet. App. 35a-36a), the value of petitioner's investment depended on many conditions in addition to the Commission's issuance of a license. For example, AGNS might not have found sufficient customers to make operation of the plant profitable. Or AGNS might have sold the Barnwell plant to a party that is not bound to use petitioner's transportation services. In short, petitioner's investment was "subject to the vagaries of the industry itself" (*id.* at 36a (footnote omitted));[5] thus, the poor outcome of petitioner's investment hardly amounts to a governmental taking of its property.

2. Contrary to petitioner's contention (Pet. 10, 14-15), *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), and *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), do not support petitioner's claim that its property was taken because the government allegedly encour-

[5] Indeed, even though President Reagan has endorsed commercial reprocessing, AGNS apparently abandoned the Barnwell project for economic reasons (87-1481 Gov't C.A. App. 317).

aged it to enter the reprocessing industry. In *Monongahela Navigation Co.*, there was no dispute that the government had taken private property; the United States condemned and appropriated a lock and a dam owned by the Monongahela Company. See 148 U.S. at 324. The issue was the amount of proper compensation. In resolving that question, the Court simply noted that the United States had invited construction of the structures and thus had no basis for claiming that the lock and dam were "wrongfully there" (*id.* at 335).

In *Kaiser Aetna*, the government imposed a right of public access to a privately owned pond, which had been improved with the consent of the government. This Court held that the government's creation of a right of public access was a taking because the "right to exclude" is "a fundamental element of the property right" (444 U.S. at 179-180 (footnote omitted)). Accord *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Here, by contrast, petitioners do not claim that the government has granted others the right to use petitioner's property.

3. Lastly, petitioner contends (Pet. 2, 17) that the government took petitioner's rights under its contract with AGNS. This argument is foreclosed by the Court's decision in *Omnia Co.* v. *United States*, 261 U.S. 502 (1923). In that case, the United States required a steel company to sell all of its steel to the government. Accordingly, the steel company was unable to perform its contract with Omnia Company. The Court rejected Omnia Company's Fifth Amendment claim that the United States took Omnia's rights under the contract. The Court observed that the contract "was not appropriated but ended" (*id.* at 511). The Court noted that a taking might have occurred if the government had kept the contract "alive for the use of the Government" (*id.* at 513). But the Court held that "[f]rustration and appropriation are essentially different

things" (*ibid.*). Similarly, in this case the government has not appropriated petitioner's contractual right to receive compensation for transporting nuclear fuel to and from the Barnwell plant. Rather, petitioner merely alleges that it has suffered losses because its contractual rights have been frustrated. The Fifth Amendment does not require the government to pay for those losses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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